(18)

No. 01-394-CFX Title: Warren Christopher, Former Secretary of State, et al., Petitioners
v.
Jennifer K. Harbury

Docketed:
September 6, 2001 Court: United States Court of Appeals for the District of Columbia Circuit

Entry	Date	Proceedings and Orders
	Jun 25 2001	Application (00A1139) to extend the time to file a petition for a writ of certiorari from July 5, 2001 to August 6, 2001, submitted to The Chief Justice.
	Jun 28 2001	Application (00A1139) granted by the Chief Justice extending the time to file until August 6, 2001.
	Jul 27 2001	Application (00A1139) to extend further the time to file a petition for a writ of certiorari from August 6, 2001 to September 3, 2001, submitted to The Chief Justice.
	Jul 31 2001	Application (00A1139) granted by the Chief Justice extending the time to file until September 3, 2001.
	Sep 4 2001	Petition for writ of certiorari filed. (Response due November 5, 2001)
	Sep 21 2001	Order extending time to file response to petition until November 5, 2001.
	Oct 17 2001	DISTRIBUTED for Conference of November 2, 2001
	Oct 26 2001	Response requested.
	Nov 5 2001	Brief of respondent Jennifer K. Harbury in opposition filed.
	Nov 20 2001	REDISTRIBUTED for Conference of December 7, 2001
	Nov 20 2001	Reply brief of petitioners Warren Christopher, et al. filed.
	Dec 10 2001	Petition GRANTED. SET FOR ARGUMENT March 18, 2002. **********
	Jan 24 2002	Brief amicus curiae of United States filed.
	Jan 24 2002	Joint appendix filed.
	Jan 24 2002	Brief of petitioners Warren Christopher, et al. filed.
	Jan 30 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Feb 1 2002	Record filed.
	Feb 1 2002	LODGING consisting of ten copies of four documents submitted by counsel for petitioners received and distributed.
	Feb 11 2002	CIRCULATED.
	Feb 25 2002	Brief amicus curiae of Association of Trial Lawyers of America filed.
	Feb 25 2002	Brief amicus curiae of Brennan Center for Justice filed.
	Feb 25 2002	Brief amici curiae of Lawyers' Committee for Civil Rights of SF Bay Area, et al. filed.
	Feb 25 2002	Brief of respondent (printed copies mailed Feb. 25 from California) filed.
	Mar 1 2002	Motion of Brennan Center for Justice for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Mar 4 2002	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided

2 pp

No. 01-394-CFX

Entry	Date	Proceedings and Orders
		argument GRANTED.
	Mar 11 2002	Reply brief of petitioners Warren Christopher, et al. filed.
	Mar 15 2002	Motion of Brennan Center for Justice for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
	Mar 15 2002	LODGING consisting of 26 copies of lower court transcript submitted by the Solicitor General and distributed.
	Mar 18 2002	ARGUED.

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No. 01-

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

WARREN CHRISTOPHER, MARILYN MCAFEE, ALEXANDER WATSON, ANNE PATTERSON, PEG WILLINGHAM, ANTHONY LAKE, and RICHARD E. FEINBERG,

Petitioners,

v.

JENNIFER K. HARBURY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

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PETITION FOR A WRIT OF CERTIORARI

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111 pp

QUESTIONS PRESENTED

1. Whether allegations that senior State Department and National Security Council officials withheld information and intentionally misled a private citizen about a foreign rebel leader in the captivity of a foreign government state a violation of the constitutional right of access to the courts, when the only claim is that defendants' speech was intentionally misleading and there are no allegations that the plaintiff ever tried to file a lawsuit and was actually hindered in that effort?

2. If the Court concludes that a constitutional violation is properly grounded on allegations such as these, whether government officials violate clearly established law whenever they allegedly mislead a private citizen or conceal information and it is later claimed that they intended to and did hinder the filing of a hypothetical lawsuit?

PARTIES TO THE PROCEEDING

The petitioners in this case are all are or were officials with the Department of State or the National Security Council. The Department of State petitioners are Warren Christopher (former Secretary of State), Marilyn McAfee (former Ambassador to Guatemala), Alexander Watson (as Assistant Secretary for InterAmerican Affairs), Anne Patterson (as Deputy Assistant Secretary of InterAmerican Affairs), and Peg Willingham (as Guatemala Desk Officer). The National Security Council petitioners are Anthony Lake (former National Security Advisor and head of the National Security Council) and Richard E. Feinberg (as a staff member of the National Security Council). Petitioners are defendants in this case and were the appellees in the court below. Also named as defendants in this case were three former directors of the Central Intelligence Agency (John M. Deutch, R. James Woolsey, and Robert M. Gates); fourteen officials and employees of the Central Intelligence Agency (David Cohen, John J. DeVine, Hugh E. Price, Thomas A. Twetten, John C. Gannon, Douglas J. MacEachin, John L. Helgerson, Terry R. Ward, Brian Latelle, Richard N. Cooper, Christine N. Williams, Joseph S. Nye, Fritz W. Esmarth, Dan Donahue, and Frederick A. Brugger), unnamed employees of the Department of State, National Security Council, and Central Intelligence Agency; the Department of State, National Security Council, and Central Intelligence Agency; and the United States of America (which was substituted as a party for purposes of the tort claims asserted originally against the named defendants). All of the petitioners are individuals or government entities, and thus there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

Jennifer K. Harbury is the plaintiff in this case on her own behalf and as administratrix of the Estate of Efrain Bamaca-Velasquez, and she was the appellant in the court below.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS BELOW 3

STATEMENT OF JURISDICTION 3

PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

A. The Allegations in the Complaint 4

B. The District Court Proceedings 7

C. The Decision by the Court of Appeals 9

REASONS FOR GRANTING THE WRIT 12

I. THE RULING BELOW THAT GOVERNMENT OFFICIALS VIOLATE A PRIVATE CITIZEN'S CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS BY PROVIDING INTENTIONALLY MISLEADING INFORMATION IS OUT OF STEP WITH THE COURT'S PRECEDENTS 15

TABLE OF CONTENTS
(continued)

PAGE

II. THE CIRCUITS ARE SPLIT ON KEY ELEMENTS OF ANY CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS IN THIS CONTEXT 18

III. THE COURT OF APPEALS MISAPPLIED THIS COURT'S PRECEDENTS AND PLAINLY ERRED BY DENYING QUALIFIED IMMUNITY HERE .. 23

IV. IF ALLOWED TO STAND, THE RULING BELOW WOULD HAVE PROFOUNDLY ADVERSE CONSEQUENCES FOR THE CONDUCT OF OUR FOREIGN POLICY AND THE UTILITY OF AMERICAN INTELLIGENCE EFFORTS 27

CONCLUSION 29

TABLE OF AUTHORITIES

PAGE

Cases

Anderson v. Creighton,
483 U.S. 635 (1987) 2, 26
Bell v. City of Milwaukee,
746 F.2d 1205 (7th Cir. 1984) 22
Bivens v. Six Unknown Named Agents,
403 U.S. 388 (1971) 4
Boddie v. Connecticut,
401 U.S. 371 (1977) 15
Bounds v. Smith,
430 U.S. 817 (1977) ..... *passim*
California Motor Transp. Co. v. Trucking Unlimited,
404 U.S. 508 (1972) 15
Chambers v. Baltimore & O. R.R.,
207 U.S. 142 (1907) 15
City of Los Angeles v. Lyons,
461 U.S. 95 (1983) 7
County of Sacramento v. Lewis,
523 U.S. 833 (1998) 12
Crowder v. Sinyard,
884 F.2d 804 (5th Cir. 1989),
cert. denied, 496 U.S. 924 (1990) 16, 21, 23, 27
Cullinan v. Abramson,
128 F.3d 301, 311 (6th Cir. 1997),
cert. denied, 523 U.S. 1004 (1998) 24
Delew v. Wagner,
143 F.3d 1219 (9th Cir. 1998) 10, 20, 25
Elder v. Holloway,
510 U.S. 510 (1994) ..... 23, __
Foster v. City of Lake Jackson,
28 F.3d 425 (5th Cir. 1994) 18, 26, 27
Harlow v. Fitzgerald,
457 U.S. 800 (1982) 2, 23, 26

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

Hudson v. Palmer,
468 U.S. 517 (1984) 17
Hunter v. Bryant,
502 U.S. 224 (1991) (per curiam) 26
Jenkins ex rel. Hall v. Talladega City Bd. of Educ.,
115 F.3d 821, 826 n.4 (11th Cir.) (en banc),
cert. denied, 522 U.S. 966 (1997) 24
Johnson v. Avery,
393 U.S. 483 (1969) 15
Lewis v. Fletcher,
518 U.S. 343 (1996) 13, 16, 17
Lujan v. G&G Fire Sprinklers,
121 S. Ct. 1446 (2000) 17
Malley v. Briggs,
475 U.S. 335 (1986) 26, 27
Miller v. Albright,
523 U.S. 420 (1998) 7
Mitchell v. Forsyth,
472 U.S. 511 (1985) ..... *passim*
Paratt v. Taylor,
451 U.S. 527 (1981) 17
Paul v. Davis,
424 U.S. 693 (1976) 18
Procunier v. Navarette,
434 U.S. 555 (1978) 24, 27
Ryland v. Shapiro,
708 F.2d 967 (5th Cir. 1983) 15, 18, 27
Saucier v. Katz,
121 S. Ct. 2151 (2001) 12
Siegert v. Gilley,
500 U.S. 226 (1991) 12

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

Swekel v. City of River Rouge,
119 F.3d 1259 (6th Cir. 1997) ..... *passim*
Thornburgh v. Abbott,
490 U.S. 401 (1989) 16
United States v. Verdugo-Urquidez,
494 U.S. 259 (1990) 7
Vasquez v. Hernandez,
60 F.3d 325 (7th Cir. 1995) 22
Wilson v. Layne,
526 U.S. 603 (1999) ..... *passim*

Constitutional Provisions, Statutes, and Rules

U.S. CONST. art. IV, § 2 ..... *passim*
U.S. CONST. amend. I ..... *passim*
U.S. CONST. amend. V ..... *passim*
28 U.S.C. § 1254(1) 3
Fed. R. Civ. P. 54(b) 9

Other Authorities

Richard H. Fallon & Daniel J. Meltzer,
New Law, Non-Retroactivity, and Constitutional Remedies, 104 HARV. L. REV. 1731 (1991) 24
Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*,
23 GA. L. REV. 597 (1989) 24
Richard B. Saphire, *Qualified Immunity in Section 1983 Cases and the Role of State Decisional Law*,
35 ARIZ. L. REV. 621 (1993) 24

No. 01-

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

WARREN CHRISTOPHER, MARILYN MCAFEE, ALEXANDER WATSON, ANNE PATTERSON, PEG WILLINGHAM, ANTHONY LAKE, and RICHARD E. FEINBERG,

Petitioners,

v.

JENNIFER K. HARBURY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Petitioners respectfully petition for a writ of *certiorari* to review the judgment entered by the United States Court of Appeals for the D.C. Circuit in this proceeding.

The ruling below expands the constitutional right of access to the courts beyond all recognizable boundaries. Some lower courts have shown their willingness to take issues usually resolved through ordinary legal and judicial processes and transform them into constitutional violations. The court below now has gone considerably further by holding that government officials infringe this constitutional right when they affirmatively

misrepresent or conceal information, and it can be alleged that they did so in part to avoid or forestall a lawsuit. This all-encompassing conception of the Constitution has little in common with the Court's decisions.

Even if this supposed constitutional right does exist in this context, the ruling below deepens a circuit split over key elements of such a claim and would greatly broaden its applicability. First, the D.C. Circuit declined to adopt the approach embraced by the Sixth and Ninth Circuits, which have rejected access-to-courts claims absent any contention that the plaintiff tried to file a lawsuit and was actually hindered in that effort. Second, decisions from other circuits have required conduct that is much more egregious than mere allegations that government officials misrepresented or concealed information they were under no duty to provide. For these reasons, plenary review is warranted in this case.

The ruling below also sharply undermines the defense of qualified immunity that the Court has extended to shield government officials from personal liability. Those officials performing discretionary functions are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The contours of the alleged rights must be so clear that "in the light of preexisting law, the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Yet the ruling below holds that government officials violate clearly established law whenever they are alleged to have misrepresented or concealed information, since it can always be claimed later that their actions were intended to and did hinder the filing of some hypothetical lawsuit.

This holding will chill both the speech and the discretion of government officials. Moreover, as in this case, the profoundly adverse consequences of such a ruling for the conduct of our foreign policy and for the utility of American intelligence efforts are apparent. At the time these officials acted, no controlling decision and indeed no decision by *any* court *anywhere* in the

country had held that their actions were unlawful, and in fact the sparse rulings on qualified immunity supported their position. Thus, it was egregious error for the court of appeals to set aside the district court's ruling and negate the defense of qualified immunity.

OPINIONS BELOW

The opinion of the Court of Appeals for the D.C. Circuit is reported as *Harbury v. Deutch*, 233 F.3d 596 (D.C. Cir. 2000), and is reprinted in the Appendix to this petition ("Pet. App.") at 1a-29a. The D.C. Circuit's opinion reversed an order and opinion of the district court, which granted petitioners' motion to dismiss and upheld their defense of qualified immunity. The district court's unreported opinion is reprinted at Pet. App. 30a-57a. The court of appeals denied a timely petition for rehearing, which is reported as *Harbury v. Deutch*, 244 F.3d 956 (D.C. Cir. 2001), and reprinted at Pet. App. 61a-68a. The court of appeals also denied a suggestion of rehearing *en banc*, with two judges dissenting, which is reported as *Harbury v. Deutch*, 244 F.3d 960 (D.C. Cir. 2001), and reprinted at Pet. App. 69a-71a.

STATEMENT OF JURISDICTION

The court of appeals denied a timely petition for rehearing on April 6, 2001. Pet. App. 61a. The Court twice granted timely requests for extensions of the time within which to file a petition for certiorari, which was extended most recently to and including September 3, 2001. *See id.* at 72a-73a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

U.S. CONST. amend. V.

The Privileges and Immunities Clause of the United States Constitution provides as follows:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.S. CONST. art. IV, § 2.

STATEMENT OF THE CASE

A. The Allegations in the Complaint.

Respondent filed suit in 1996 against the Department of State, National Security Council (NSC), Central Intelligence Agency (CIA), and numerous officials and employees from each agency in both their individual and official capacities. The individuals named in her lawsuit include senior officials such as former Secretary of State Warren Christopher, former NSC head Anthony Lake, and former Ambassador to Guatemala Marilyn McAfee. Respondent asserts tort claims under the Federal Tort Claims Act (for which the United States of America has been substituted as a party), as well as constitutional claims for declaratory and injunctive relief, including a claim that she was denied her right of access to the courts under the First and Fifth Amendments. Respondent also sued the named individuals for damages on her constitutional claims under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and defendants moved to dismiss both as a matter of law and based on qualified immunity.

In her Second Amended Complaint, respondent makes the following factual allegations that the courts have assumed to be true at this juncture. She is an American citizen and is the widow of Efrain Bamaca-Velasquez, a Guatemalan citizen and

high-ranking commander of a Guatemalan rebel group, who vanished on March 12, 1992. *See* Pet. App. 2a, 30a. Although the Guatemalan army declared that Bamaca had committed suicide during an armed skirmish and that it had buried his body, this was not true. *See id.* at 3a. Instead, Bamaca had been captured and detained by members of the Guatemalan military, among whom were paid CIA informants. *See id.* The CIA is alleged to have been aware that Bamaca was being held by the Guatemalan army and that its paid agents would be involved in torturing him to obtain information. *See id.* at 5a.

Respondent also alleges that early in 1993, she learned from an escaped prisoner that her husband was alive and being tortured. She immediately contacted several State Department officials, told them what she had learned, and asked for information about her husband. *See* Pet. App. 3a. She states that the officials promised to look into the matter, but never provided her with any information. In August of 1993, she obtained permission to open Bamaca's grave and discovered that the body was not his. She immediately informed petitioner McAfee, who said she would investigate the matter but never provided respondent with any information. *See id.*

Bamaca was executed some time around September of 1993. *See* Pet. App. 3a. Over the next year, from October 1993 to October 1994, respondent met repeatedly with State Department officials, who assured her they were looking into the matter and told her the Guatemalan military had advised them that it did not have (and that it had never had) custody of Bamaca. *See id.* at 3a-4a. At that point, the CBS news program *60 Minutes* reported that the U.S. Embassy in Guatemala had an intelligence report stating that Bamaca had been captured alive. In response, the State Department publicly confirmed his capture, stating that he had been lightly wounded and was held prisoner for some time, and that it had no information confirming that he was still alive. *See id.* at 4a. Shortly thereafter, respondent met with petitioner Lake, head of the NSC, who told her the government had "scraped the bottom of the barrel" for information about her husband, that no further

information existed, and that he and other officials would keep looking and keep her informed. *See id.*

Respondent suspected that the State Department and NSC officials were withholding information and so filed a Freedom of Information request. Despite expedited proceedings, she did not receive any documents in the following months. *See* Pet. App. 4a. In March of 1995, she commenced a hunger strike in front of the White House. She also met with State Department and NSC officials, who told her that they believed Bamaca to be dead because so much time had passed with no evidence that he was still alive. A few days later, Congressman Bob Torricelli announced publicly that Bamaca had been killed years before on orders from one of the paid CIA informants. *See id.* at 4a-5a. Respondent alleges that petitioners intentionally misled her and concealed information in an effort to conceal their role and the government's role in Bamaca's death. *See id.*

In the Second Amended Complaint, respondent raised a variety of tort claims, including intentional infliction of emotional distress and wrongful death, as well as a claim for alleged violations of international law. *See* Pet. App. 7a. She also raised three constitutional claims: (1) defendants violated Bamaca's substantive due process rights under the Fifth Amendment by contributing to his torture; (2) defendants violated her constitutional right to familial association by participating in and concealing information about Bamaca's torture and murder; and (3) petitioners violated her constitutional right of access to the courts by misrepresenting and concealing information about her husband's fate. *See id.*

For purposes of this petition, respondent's principal *Bivens* claim rests on her allegations that petitioners (but not the other defendants) made intentionally misleading statements and omissions that prevented her from "effectively seeking adequate legal redress, petitioning the appropriate government authorities, and seeking to publicize her husband's true plight." Pet. App. 5a (quotation omitted).

B. The District Court Proceedings.

Defendants moved to dismiss respondents' claims in their entirety. After both sides briefed the legal issues, the district court (Kollar-Kotelly, J.) issued a thorough opinion that granted the motion to dismiss in relevant part and dismissed all of respondent's constitutional claims, leaving her tort claims to proceed under the Federal Tort Claims Act. *See* Pet. App. 30a-57a.

The court began by holding that defendants were not entitled to sovereign immunity on respondent's official capacity claims, since constitutional claims are a recognized exception to that defense. *See* Pet. App. 31a-32a. Nonetheless, it went on to apply *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), to hold that respondent lacked standing to press those claims for declaratory and injunctive relief. *See id.* at 32a-34a.

The district court then addressed the three *Bivens* claims that were asserted against the defendants in their individual capacities. With respect to each claim, the court concluded that respondent's constitutional claims were insufficient as a matter of law and, in the alternative, that defendants were entitled to qualified immunity on those claims. *See* Pet. App. 35a-55a.

First, on the substantive due process claim that respondent asserted on behalf of the deceased Bamaca, the district court found controlling the Court's explicit rejection of "'the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.'" Pet. App. 39a (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990)). It thus found as a matter of law that this claim was subject to dismissal. In addition, the court held that it is at best "'unclear whether an alien may assert constitutional objections when he or she is outside the territory of the United States,'" *id.* at 42a (quoting *Miller v. Albright*, 523 U.S. 420, 451 (1998) (O'Connor, J., concurring)), and thus the defendants were entitled to qualified immunity on this claim.

Second, the district court rejected respondent's claim that petitioners had infringed her constitutional right of access to the

courts. The court recognized the validity of this right as protecting more than mere physical access to the courts, but agreed with those courts which have "required the plaintiff to have already attempted to gain access to state-court remedies before bringing a constitutional denial-of-access claim." Pet. App. 45a (citing cases).[1] In this regard, it approvingly quoted the Sixth Circuit's observation that "[b]efore filing an 'access to courts' claim, a plaintiff must make some attempt to gain access to the courts; otherwise, how is this court to assess whether such access was in fact 'effective' and 'meaningful'?" *Swekel v. City of River Rouge*, 119 F.3d 1259, 1264 (6th Cir. 1997) (quoted at Pet. App. 46a). Since respondent had never taken this necessary step, her "suspicion that the alleged cover-up may have prejudiced her rights to bring a separate action is nothing more than a guess," *id.*, and her claim was insufficient as a matter of law.

Because the district court recognized that any dismissal of this claim would be without prejudice to refile at a later time once respondent had attempted to prosecute her state-court claim, it proceeded to consider the qualified immunity issue. It held that petitioners were entitled to qualified immunity because, at the time they acted, the cases recognizing an access-to-courts claim had all involved more egregious allegations that defendants had "destroyed evidence, manufactured evidence, or refused to satisfy a duty to investigate." Pet. App. 48a. By contrast, in this case respondent alleged only that petitioners had misled her by assuring her that "the government had no information about Bamaca and made allegedly disingenuous overtures to assist her." *Id.* Especially given the sensitive subject matter, which touched on delicate matters of relations with a foreign government, the court stated it could not hold that petitioners "would have reasonably known that they [had to] be forthcoming in discussing the intelligence that they had

[1] The court expressly noted a circuit conflict on the issue of whether to impose this requirement as an element of a right-of-access claim, but sided with what it described as "the better view" in favor of doing so. *See* Pet. App. 46a & n.2 (citing cases).

received about Bamaca." *Id.* Therefore they were entitled to qualified immunity on the access-to-courts claim.

Third, the district court held that respondent's familial association claim failed as a matter of law because the defendants' actions were not aimed directly at the familial relationship, and this limiting principle "best accords with Supreme Court precedent and the principles espoused in the First and Fifth Amendments." Pet. App. 50a. Even if the court had declined to apply this restriction, it determined that the law was not clearly established that any such constitutional claim can be extended beyond the parent-child relationship, and thus again qualified immunity was appropriate. *See id.* at 52a.

Pursuant to Federal Rule of Civil Procedure 54(b), the district court certified its dismissal of respondent's *Bivens* claims as final, *see* Pet. App. 59a, and thereafter respondent appealed.

C. The Decision by the Court of Appeals.

The court of appeals (*Tatel*, Edwards, Ginsburg) affirmed the district court in almost all respects, but reversed and reinstated respondent's claimed violation of her constitutional right of access to the courts. *See* Pet. App. 1a-29a.

On respondent's access-to-courts claim, the court began by stating that the Constitution does confer such a right, which "not only protects the ability to get into court, . . . but also ensures that such access be 'adequate, effective, and meaningful.'" Pet. App. 21a (quoting *Bounds v. Smith*, 430 U.S. 817, 822 (1977)). It then discussed decisions from other circuits which "have found that government cover-ups can infringe the right of access to the courts," Pet. App. 21a, and noted respondent's allegations that petitioners had misled her and concealed information that deprived her "'of her right . . . to adequate, effective, and meaningful access to the courts,'" *id.* at 22a (quoting complaint). Petitioners argued that these other decisions were inapposite, because all involved instances "where police officers charged with investigating a crime destroy, conceal, or manufacture evidence in violation of statutory duties." *Id.* at 22a-23a. Yet the court rejected this view,

finding sufficient respondent's allegations that they intentionally deceived her and did so in part to prevent her from bringing suit. The court held that "regardless of whether State and NSC officials had an affirmative duty to provide information to [her] in the first place, the complaint states a clear case of denial of access to courts." *Id.* at 23a.

The court of appeals also rejected the principal basis for the district court's contrary decision. It recognized that its decision would appear inconsistent with decisions by the Sixth and Ninth Circuits, which had rejected access-to-courts claims where plaintiffs had not yet completed prosecuting their tort claims and thus could not yet establish that their state court remedies had been rendered ineffective. *See* Pet. App. 23a-24a (discussing *Swekel*, 119 F.3d at 1264, and *Delew v. Wagner*, 143 F.3d 1219, 1222-23 (9th Cir. 1998)). Yet here respondent claimed that had she known all the true facts, she might have been able to take some action to save her husband's life, such as "seeking adequate legal redress, petitioning the appropriate government authorities, and seeking to publicize her husband's true plight through the media." Pet. App. 24a (quoting complaint). At argument, respondent had elaborated that she might have sought "an emergency injunction based on an underlying tort claim for intentional infliction of emotional distress" or filed her FOIA requests sooner. *Id.* Because respondent had thus identified some possibility of irreparable harm from petitioners' conduct, the court of appeals held that the "exhaustion" requirement imposed by the Sixth and Ninth Circuits was not applicable to her claims. *See id.* at 25a. And even though respondent could have decided to file a lawsuit or her FOIA requests at any time, the court found that because of petitioners' alleged concealments she may not have known enough to do so. *See id.* at 24a-26a.

With respect to qualified immunity, the court of appeals rejected the district court's conclusion that the unlawfulness of petitioners' conduct would not have been apparent from prior cases involving "allegations of 'nefarious conduct,' such as manufacturing false evidence or destroying or refusing to collect evidence," even though they were under no statutory obligation

to investigate the matter. Pet. App. 26a. Instead, it held that petitioners' alleged conduct was clearly unconstitutional insofar as they "affirmatively misled" respondent and one of their purposes in doing so was "preventing her from filing a lawsuit." *Id.* at 27a. The court did not specify the decisions prior to 1993 that had clearly established the unlawfulness of such conduct, and did not identify any *controlling* decisions on this point, but purported to "[join] our sister circuits" by simply proclaiming that "we think it should be obvious to public officials that they may not affirmatively mislead citizens for the purpose of protecting themselves from suit." *Id.* at 28a.

A timely petition for rehearing and suggestion for rehearing *en banc* was denied, *see* Pet. App. at 61a-71a, with Judges Henderson and Sentelle dissenting from denial of rehearing *en banc*. Judge Henderson's dissent agreed with the district court that respondent "suffered no constitutional deprivation or, alternatively, if she did, the individual defendants are entitled to qualified immunity from liability therefor." *Id.* at 70a. Because respondent had not identified "any effective relief" that had been foreclosed by petitioners' alleged misrepresentations and nondisclosures, she could not establish that their conduct was "a substantial cause of [her] failure to obtain judicial relief." *Id.* (quotation omitted). Moreover, the extant precedents were so sparse and distant from the allegations in this case that petitioners would not have been "on notice that such very different conduct might violate [respondent's] right of access to the courts." *Id.* at 71a.

The panel commented further in response to the dissent. First, the panel expressly noted that its holding did in fact transcend "the general requirement that prior to bringing a claim for deprivation of access to courts based on an alleged cover-up, plaintiff must first press her underlying claims to ensure that the alleged cover-up in fact prejudiced her ability to seek relief." Pet. App. 62a. Nonetheless, it contended that this expansion was justified because petitioners' conduct "completely foreclosed" her ability to obtain a specific form of relief in a hypothetical lawsuit – injunctive relief based on a tort claim for intentional infliction of emotional distress – that might have

saved her husband's life. *Id.* It also suggested that the opinion was narrow in scope, being limited to situations where "defendants both affirmatively mislead plaintiffs and do so for the very purpose of protecting government officials from suit," including efforts to protect either themselves or other officials. *Id.* Finally, with respect to qualified immunity, the panel rejected the notion that cases from other circuits involving the fabrication of evidence were not specific or pertinent enough to put petitioners on notice that their alleged conduct here would violate "clearly established" constitutional rights and give rise to personal liability for damages (though many of the cases cited postdated the conduct at issue here). *See id.* at 66a-67a.

This petition for *certiorari* followed. Petitioners are the State Department and NSC officials who were sued in their individual capacity, as they were the only defendants named by respondent on her access-to-courts claim.

REASONS FOR GRANTING THE WRIT

The courts below recognized and applied the methodology that this Court has now specifically required in qualified immunity cases, under which the courts "'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.'" Pet. App. 8a-9a (quoting *Wilson v. Layne*, 526 U.S. 603, 609 (1999)). *See also Saucier v. Katz*, 121 S. Ct. 2151, 2155-56 (2001); *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998); *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Accordingly, the court below made two rulings in this case that are independently worthy of review here: *first*, a party states a valid claim for a violation of the constitutional right of access to the courts by alleging that government officials made affirmatively misleading statements or concealed information where one of their purposes was to protect themselves from suit; *second*, this right was "clearly established" in 1993 – based on lower court decisions that were neither clear nor controlling – such that government officials who allegedly engaged in such conduct are not entitled to qualified immunity.

On the first issue, addressing the merits of respondent's claim that her constitutional right of access to the courts was violated in this case, some of the lower courts have departed dramatically from the Court's precedents to fashion a novel right that would constitutionalize issues which are already adequately addressed by the ordinary legal and judicial processes of this country. In this case, in particular, the court below held explicitly that government officials violate such a right when they affirmatively mislead or conceal information from a private citizen and one of their purposes was to protect themselves from suit, regardless of what their other purposes and objectives may be. *See* Pet. App. 28a; *id.* at 23a ("*One of* their express objectives, [respondent] alleges, was to prevent her from suing them.") (emphasis added). This far-reaching version of the Constitution cannot be squared with the Court's precedents in this area, *see, e.g., Lewis v. Fletcher*, 518 U.S. 343 (1996); *Bounds v. Smith*, 430 U.S. 817 (1977), and it should be repudiated in this case.

Moreover, the ruling below parts company with other circuits in two key respects that dramatically expand the application of this right of access to courts. First, as the court of appeals acknowledged, at least two other circuits have declined to uphold access-to-courts claims absent any contention that the plaintiff tried to file a lawsuit and was actually hindered in that effort. *See* Pet. App. 23a-24a. This requirement erects a substantial bar to the easy acceptance of such claims. Nonetheless, the court below dispensed with this limitation in any circumstance where the plaintiff can allege some potential source of irreparable harm entitling them to a particular form of relief. Second, other circuits that have upheld such claims have required much more than allegations that government officials misled or concealed information they were under no legal duty to provide. Indeed, as the district court noted, in "each of [those other] cases, . . . the defendants had affirmatively destroyed evidence, manufactured false evidence, or intentionally refused to collect evidence" contrary to an express legal duty to do so. *Id.* at 47a. By relaxing these criteria and allowing constitutional claims based on mere

"disinformation," the court below again expanded the scope of the alleged right of access in new and troublesome ways.

On the second issue, this case raises a question that arises frequently in the lower courts and that is crucial to preserving the objectives served by the defense of qualified immunity: when there is no binding authority from the Supreme Court or from the relevant Court of Appeals to resolve the issue of whether the law was clearly established at the time of the acts in question, what weight (if any) is to be given to the decisions of other courts on the specific issue at stake? The very limited guidance on that issue from this Court has enabled the courts of appeals to adopt very different approaches. Even more problematic, the lower courts here rejected the defense of qualified immunity, despite the fact that other courts have rejected the alleged constitutional violation or have upheld the defense of qualified immunity in similar circumstances. Petitioners suggest that the Court's precedents squarely preclude this result and thus mandate summary reversal on the qualified immunity issue in this case. As the Court has said time and again, government officials do not have to prophesy future trends in constitutional jurisprudence on pain of personal liability for money damages. *See, e.g., Wilson v. Layne*, 526 U.S. 603, 617-18 (1999).

If the ruling below is allowed to stand, then government officials will be subjected to personal liability where they mislead or conceal information and their motivation can be alleged *in part* to be avoiding or forestalling a lawsuit. The consequences of this position would be profound. To begin with, such constitutional claims may turn out to be viable in a great many instances where the plaintiff can claim that he or she would have brought some form of action for injunctive relief alleging irreparable harm. Moreover, the desire to avoid lawsuits is easy to allege, even where public officials obviously have other motivations as well, including reasons not to be completely forthright in discussing sensitive facts or issues, such as the need to preserve the secrecy of government deliberations or even of covert operations. Further, since this decision was issued by the controlling court of appeals in the nation's capital, the adverse

effects for the conduct of foreign policy and the pursuit of American intelligence efforts would be significant and undeniable.

I. THE RULING BELOW THAT GOVERNMENT OFFICIALS VIOLATE A PRIVATE CITIZEN'S CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS BY PROVIDING INTENTIONALLY MISLEADING INFORMATION IS OUT OF STEP WITH THE COURT'S PRECEDENTS.

In upholding respondent's right-of-access claim in this case, the court of appeals joined other lower courts that have gone well beyond the Court's precedents in this area. It did so by adapting and expanding prior decisions in which this Court had invoked the Due Process Clause to disapprove institutional mechanisms that systematically barred access to the courts or had imposed arbitrary restrictions on judicial access for prisoners held in government custody. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 374-83 (1977) (individuals cannot be denied access to courts to dissolve their marriage based on inability to pay required costs); *Bounds v. Smith*, 430 U.S. 817, 822 (1977) (prisoner's right of access to the courts requires access to pertinent legal materials to make it "adequate, effective, and meaningful"); *Johnson v. Avery*, 393 U.S. 483, 490 (1969) (invalidating regulation that unreasonably limited prisoner's access to other prisoners who can provide legal advice).[2] The ruling below, however, takes this right of access in new directions by constitutionalizing issues that are already adequately addressed by the ordinary legal and judicial processes of this country.

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[2] Lower courts that have discussed the right of access in the context of private civil proceedings have also stated that it may derive from the Privileges and Immunities Clause, *see, e.g., Chambers v. Baltimore & O. R.R.*, 207 U.S. 142, 148 (1907), or from the right to petition conferred by the First Amendment, *see, e.g., California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). *See generally Ryland v. Shapiro*, 708 F.2d 967, 971-72 (5th Cir. 1983).

The court below expressly held that government officials violate this right of access to the courts when they hinder a private citizen from bringing a lawsuit by misrepresenting or concealing information, and at least *one* of their purposes was to protect themselves from suit, regardless of what other purposes they may have had. *See* Pet. App. 28a, 23a. But this expansive reading of the Constitution is out of step with the Court's more recent precedents in this area, which have cut back the scope of the right. *See, e.g., Lewis v. Fletcher*, 518 U.S. 343 (1996) (overturning broad injunctive relief premised on alleged *Bounds* violations); *Thornburgh v. Abbott*, 490 U.S. 401, 409-12 (1989) (stating more permissive test for evaluating restrictions on prisoners). Indeed, the Fifth Circuit has expressed skepticism about applying precedents like *Bounds* in this very different setting:

> In the world of litigation outside prison walls, these cases are of little assistance. Unlike prisoners, ordinary individuals do not find any physical barriers between them and the courts. To file a complaint or legal paper, they need merely travel to the courthouse or even just the nearest mailbox; to get legal advice, they need only travel to a lawyer's office or the nearest law library, or pick up the telephone.

Crowder, 884 F.2d 804, 811-12 (5th Cir. 1989), *cert. denied*, 496 U.S. 924 (1990).

Indeed, in *Lewis*, which partially curbed the reach of *Bounds*, the Court expressly repudiated any "suggest[ion] that the State must enable the prisoner to *discover grievances*, and to *litigate effectively* once in court." 518 U.S. at 354 (emphasis in original). As the Court stated: "These elaborations upon the right of access to the courts have no antecedent in our pre-*Bounds* cases, and we now disclaim them." *Id.* Under *Lewis*, therefore, the Constitution does not require government officials to take affirmative steps to enable prisoners held in their custody to "discover grievances" and "to litigate effectively," even though their confinement substantially hampers their litigating capacity as "one of the incidental (and perfectly

constitutional) consequences of conviction and incarceration." *Id.* Clearly, then, public officials are under no corresponding duty to take such steps on behalf of private citizens who enjoy continual and unfettered access to the federal and state court systems. *Id.* at 355; *see also id.* at 365 (Thomas, J., concurring) (expressing doubts about the validity of *Bounds* and "of a loosely defined 'right of access to the courts'").

The broader version of the constitutional cause of action that emerges from the ruling below in this case also appears to be directly inconsistent with the thrust of the Court's procedural due process cases. Reversing the district court's dismissal of the access-to-courts claim, the court of appeals held that respondent was not required to show that she had ever tried to file a lawsuit and had actually been hindered in that effort. *See* Pet. App. 23a-26a; *see also infra* Section II (discussing circuit conflict on this point). Abandoning this important "exhaustion" requirement has the potential to unleash massive amounts of constitutional litigation that would displace great swaths of state tort law. The Court's precedents take a dim view of this prospect.

In *Paratt v. Taylor*, 451 U.S. 527 (1981), for example, the Court held that a prisoner did not state a valid due process claim where adequate remedies were available to seek redress in the state courts, though he had not made use of them. The Court noted that this "procedure was in existence at the time of the loss here in question," and though "the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded [in federal court], that does not mean that the state remedies are not adequate to satisfy the requirements of due process," at least where the alleged deprivation did not occur pursuant to any established procedure. *Id.* at 543-44. The Court expressed special concern that any other result "would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment." *Id. See also Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (holding that *Paratt* is applicable to intentional deprivations by government officials); *Lujan v. G&G Fire Sprinklers*, 121 S. Ct. 1446, 1450 (2000) (finding no due

process violation where state withholds payment on contract because claim for payment "can be fully protected by an ordinary breach-of-contract suit").

Some of the lower courts have recognized that these concerns are just as applicable to right-of-access claims, and many distinct remedies have been cited as adequate avenues for redressing these kinds of claims. *See, e.g., Swekel v. City of River Rouge*, 119 F.3d 1259, 1264 (6th Cir. 1997) (available state tort remedies can be bolstered by doctrine of equitable tolling and separate cause of action for spoliation of evidence); *id.* at 1265 (Merritt, J., concurring) ("We should not simply displace the normal state court remedies for spoliation or concealment of evidence or obstruction of state judicial proceedings with a new, expanded, loosely worded, federal constitutional tort"); *Foster v. City of Lake Jackson*, 28 F.3d 425, 431 n.9 (5th Cir. 1994) (plaintiffs "could, of course, have sought relief in state court for the challenged behavior using a variety of state law [procedural] remedies"); *Ryland*, 708 F.2d at 973 n.7 (remedies and penalties for obstruction of justice). And in this case, in fact, respondent was never actually barred from the courts; she could have filed one or several lawsuits at any time, or she could have pursued her FOIA action sooner.

In sum, the Court should grant *certiorari* in this case to review the entire direction of lower court decisions in this area, in order to vindicate its longstanding view that the Due Process Clause was not intended to create "a font of [federal] tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976).

II. THE CIRCUITS ARE SPLIT ON KEY ELEMENTS OF ANY CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS IN THIS CONTEXT.

To the extent that a constitutional right of access to the courts is even determined to be applicable in this context, substantial disagreements remain about the necessary elements for validly stating any such claim. And obviously whether the

requisite elements are understood strictly or leniently makes a considerable difference to how often such claims would arise and how much non-constitutional law they would subsume. The ruling below justifies plenary review, among other reasons, because it defines the contours of this right far more aggressively than any other decision issued to date.

As the district court noted, the circuit courts of appeals are split on whether this right of access can be violated absent any claim that the plaintiff ever tried to file a lawsuit and was actually hindered in that effort. *See* Pet. App. 46a & n.2 (citing cases). The court of appeals itself acknowledged that at least two other circuits have declined to uphold access-to-courts claims unless the plaintiff tried to file a lawsuit and was actually hindered in that effort. *See id.* at 23a-24a. By dispensing with this requirement, the court below dramatically expanded the application of the right of access in the context of civil proceedings.

The Sixth Circuit has held that even where the plaintiff alleges "reprehensible" actions by government officials to cover up evidence in order to ward off a lawsuit, which "substantially prejudice [her] ability to recover in state court," such actions would not "amount[] to a constitutional violation" unless she can "show absolute denial from state court." *Swekel*, 119 F.3d at 1264. As the explained its sensible view of the need for such an "exhaustion" requirement:

> [Plaintiff,] however, never presented evidence that the state court could not adequately address these problems. In fact, none of the evidence before this court establishes that Swekel even attempted to go to the state court in the first instance. Before filing an "access to courts" claim, a plaintiff must make some attempt to gain access to the courts; otherwise, how is this court to assess whether such access was in fact "effective" and "meaningful"?

Id. The court therefore affirmed dismissal of the access-to-courts claim on the basis that a plaintiff "cannot merely guess that a state court remedy will be ineffective," but must show that

"the defendant's actions actually rendered any state court remedy ineffective." *Id.*

Likewise, in *Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998), the Ninth Circuit took this requirement even further by dismissing an access-to-court claim where the plaintiffs *had* brought a wrongful death claim in the state courts, but then filed suit in federal court claiming that their constitutional rights had been violated by law enforcement officers who tried to cover up their involvement in a shooting. The court held that to present a valid claim, plaintiffs must be able to show that "the defendants' cover-up violated their right of access to the courts by rendering '*any* available state court remedy ineffective.'" *Id.* at 1222-23 (quoting *Swekel*, 119 F.3d at 1264) (emphasis added). The court concluded that because their "wrongful death action remains pending in state court, it is impossible to determine whether this has in fact occurred." 143 F.3d at 1223.

After acknowledging the tension between its own approach and these decisions, *see* Pet. App. 23a-24a, the court below purported to distinguish them, but its efforts to do so are unpersuasive. The gist of its position is that because respondent alleges that she suffered irreparable harm by not bringing her claim for some form of emergency injunctive relief to save Bamaca's life before it was too late, she can plausibly claim that petitioners' alleged misrepresentations and concealments completely foreclosed her from pursuing this relief. *See* Pet. App. 24a-26a, 63a-64a. This approach, however, conflates two distinct points. By holding that respondent's constitutional rights were infringed because she was hindered in pursuing a specific remedy, rather than that she was prevented from taking her claims to court, the court below fashioned a much broader constitutional entitlement: no longer is a plaintiff entitled only to exercise a "facilitative" right to *access* the courts, but he or she can now lay claim to secure a particular and most desirable outcome. As the Fifth Circuit put the matter in rejecting a claimed right of access resting on such broad allegations: "The constitutional right of access does not, however, guarantee one the right to have one's case proceed in a particular procedural

posture *or the right to a particular form of relief.*" *Crowder*, 884 F.2d at 813-14 (emphasis added).

Indeed, the court below sought to rest its ruling upon Bamaca's intervening demise, as a unique circumstance that would militate in favor of recognizing a claimed right of access only in a few such cases. *See* Pet. App. 24a-26a, 63a-64a. But this supposed rampart lacks solidity. There is, of course, no doubt that death constitutes a substantial and irreparable harm that cannot be undone by any later proceedings. Yet in every case where the plaintiffs could plausibly claim some entitlement to injunctive relief – which necessarily includes allegations of irreparable harm – they would be able to surmount this hurdle and press their constitutional access-to-courts claim. And the prospect for recognizing such constitutional claims would be greatly enhanced, given that plaintiffs' allegations would occur against a backdrop not of any concrete litigation, but of utterly hypothetical lawsuits – such as respondent's claim that in a state tort suit for intentional infliction of emotional distress she would have been able to obtain an emergency injunction to save Bamaca's life, where it is alleged that he was being held and tortured by a foreign government.

Indeed, there is no question here that insistence on this key "exhaustion" element is determinative of the proper outcome in this case. Adopting the approach endorsed by the Sixth and Ninth Circuits, which it explicitly determined "represents the better view" on this issue, Pet. App. 46a n.2, the district court held that respondent's claim must be dismissed because she did not allege that she had ever tried to bring an action and been hindered in doing so, *see id.* at 45a-46a. Rejecting that approach, the court of appeals reversed and reinstated her claim. *See id.* at 23a-26a. Therefore, this case directly implicates the circuit split on this issue and affords an appropriate vehicle for resolving it.

The circuit courts of appeals also are split on how egregious a government official's conduct must be to trigger a valid access-to-courts claim. Other circuits that have upheld such claims have required much more than allegations that

government officials misled or concealed information they were under no legal duty to provide. Indeed, as the district court noted, in "each of [those] cases, . . . the defendants had affirmatively destroyed evidence, manufactured false evidence, or intentionally refused to collect evidence" contrary to an express legal duty to do so. Pet. App. 47a. The court of appeals again found it unnecessary to require any such strict showing in upholding respondent's claim. *See id.* at 22a-23a. But by deciding to allow constitutional claims based on mere "disinformation," the court below again expanded the scope of the alleged right of access in directions that raise further concerns.

In particular, the court below held that whenever government officials are alleged to have misrepresented or concealed information and it is alleged that at least *one* "of their express objectives . . . was to prevent [the plaintiff] from suing them," Pet. App. 23a, they can be forced to defend against constitutional right-of-access claims. And this is true regardless of what other objectives their conduct may have served, such as preserving the secrecy of government deliberations, of sensitive activities, or even of covert operations. Obviously this is a much more lenient standard than the kind of egregious conduct required by other courts, where covering up nefarious activities (either by oneself or with others) is the dominant or even the sole motivation for the defendant's actions. *See, e.g.*, Pet. App. 47a-48a; *Vasquez v. Hernandez*, 60 F.3d 325, 329 (7th Cir. 1995) (denying right-of-access claim where actions of defendants, though "inexcusable," were not "egregious" enough to justify finding a constitutional violation); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1264-65 (7th Cir. 1984) (upholding access-to-courts claim, but limiting it to "particularly egregious set of facts" before the court, where police officers killed a man then planted evidence to cover up their wrongful conduct).

The ruling below thus takes a very different approach than the decisions of other circuit courts, and the indubitable result is a direct and irreconcilable conflict that will prove dispositive on the very same claims when they are brought in different courts in different parts of the country. The D.C. Circuit has

now upheld respondent's constitutional claim that the district court had dismissed in accordance with decisions reached by those other circuit courts. Public officials and potential plaintiffs will continue to have their legal claims resolved inconsistently in different jurisdictions – under quite different renditions of their constitutional rights and duties – unless this Court intervenes.

III. THE COURT OF APPEALS MISAPPLIED THIS COURT'S PRECEDENTS AND PLAINLY ERRED BY DENYING QUALIFIED IMMUNITY HERE.

The Court has settled that public officials who perform discretionary functions are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The ruling below departs radically from this standard. In this case, there was no binding authority from this Court or from the court below which offered even a hint that petitioners' conduct would be held to violate respondent's constitutional right of access to the courts, let alone that any such right was "clearly established" as of 1993 and 1994. Shortly before, the state of the law in other jurisdictions had been accurately described as "nebulous," *Crowder*, 884 F.2d at 811, and in the years since the range of disagreement has increased rather than narrowed. These facts are dispositive in favor of qualified immunity here.

In this posture, a recurring question in addressing the issue of qualified immunity is what weight (if any) should be given to the (non-binding) decisions of other courts on the same issue? In *Harlow*, the Court expressly declined to decide when and in what circumstances the central question of whether the law was "clearly established" can be resolved by lower court case law. *See* 457 U.S. at 818 n.32. More recently, the Court encouraged a broader examination of the law from other jurisdictions, stating that a "court engaging in review of a qualified immunity judgment should therefore use its full knowledge of its own [and other relevant] precedents." *Elder v. Holloway*, 510 U.S. 510, 516 (1994) (quotation omitted; brackets in original).

The Court has indicated that decisions emanating from other jurisdictions are most relevant where they tend to show that the law was *not* uniform or settled at the time. For example, in *Procunier v. Navarette*, 434 U.S. 555 (1978), the Court considered contrary decisions from other jurisdictions in concluding that the law was not "clearly established" against the public officials sued in that case, *see id.* at 563-65 & nn.8-10, stating pointedly that they "cannot be expected to predict the future course of constitutional law," *id.* at 562. And in *Wilson v. Layne*, 526 U.S. 603 (1999), the Court took note of divisions on the merits among the lower courts and observed that if "judges thus disagree on a constitutional question, it is unfair to submit [government officials] to money damages for picking the losing side of the controversy." *Id.* at 618.

In the wake of this fairly limited guidance,[3] some courts have held that the absence of clear authority from a controlling tribunal is itself decisive in favor of qualified immunity. *See, e.g.*, *Cullinan v. Abramson*, 128 F.3d 301, 311 (6th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998); *Jenkins ex rel. Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n.4 (11th Cir.) (en banc), *cert. denied*, 522 U.S. 966 (1997). Others, such as the court below in this case, have treated the generality of this

[3] Commentators have noted the lack of definitive guidance from the Court on this issue. *See, e.g.*, Richard B. Saphire, *Qualified Immunity in Section 1983 Cases and the Role of State Decisional Law*, 35 ARIZ. L. REV. 621, 627 (1993) ("lower courts have had to struggle with the 'where to look' problem when resolving qualified immunity disputes" and "have not been uniform in their approaches to the issue"); Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1751 (1991) (ten years after *Harlow*, the question of where to look for clearly established law "remains unresolved"); Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 605 n.41 (1989) (the Supreme Court has not answered "whether the case law clearly establishing the constitutional right must come from the jurisdiction in which the defendant works, or whether cases from other jurisdictions are also relevant").

Court's guidance as license to rely on more tangential analogies to generalized precedents, and to use them even to *defeat* a claim of qualified immunity. *See* Pet. App. 26a-28a, 66a-67a. But particularly where, as here, no controlling authority clearly establishes the law one way or the other, and the tenor of other decisions confirms that the law was at least unsettled at the time (or perhaps even tilted in favor of the lawfulness of such conduct), the defense of qualified immunity must be upheld. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985) (the "decisive fact is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted").

Here the district court analyzed the issue in these terms, but the court of appeals failed to do so. *Compare* Pet. App. 47a-49a *with id.* at 26a-28a, 66a-67a. In particular, the court of appeals committed two major errors that affected its decision.

First, the court of appeals failed to come to grips with lower court precedents from other jurisdictions that had rejected access-to-courts claims in similar circumstances. As noted above, *see supra* Section II, the Sixth and Ninth Circuits have held that a plaintiff cannot state a valid claim for denial of access to the courts without first trying to file a lawsuit and being actually hindered in that effort. *See Swekel*, 119 F.3d at 1264; *Delews*, 143 F.3d at 1223. In this case, however, the court of appeals declined to impose any such requirement. *See* Pet. App. 23a-24a. In light of the disagreement among the lower courts on the merits of the underlying constitutional issues (which the district court noted, *see id.* at 46a & n.2), as well as the disagreement on the merits among the judges of the *en banc* court below, *see id.* at 70a-71a (Henderson & Sentelle, JJ., dissenting from denial of rehearing *en banc*), petitioners' defense of qualified immunity should have been upheld in this case. *See, e.g.*, *Wilson*, 526 U.S. at 618.

Second, the court of appeals relied heavily on decisions that postdated the events in question for aid in trying to show that the law was "clearly established" in favor of respondent's access-to-courts claim. *See* Pet. App. 66a-67a (citing, *inter alia*, cases from 1995, 1997, and 1998). That is wholly

improper. Public officials lose the shield of qualified immunity only when the unconstitutionality of their conduct would have been apparent "in the light of pre-existing law." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Harlow*, 457 U.S. at 818; *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The importance of close adherence to these principles is manifest in an area where the Court has stressed that qualified immunity is an "*immunity from suit* rather than a mere defense to liability," which is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526 (emphasis in original). In fact, at the time petitioners acted, no controlling decision and indeed no decision by *any* court *anywhere* in the country had definitively ruled that their actions were unlawful. Against this backdrop, the court of appeals simply could not legitimately invalidate their defense of qualified immunity.

Summary reversal is therefore warranted on this claim. Such a result will serve judicial administration by reasserting the Court's authority to superintend the lower courts and ensure strict fidelity to the important doctrine of qualified immunity. Indeed, the Court has used the mechanism of summary reversal to overturn other flawed lower court rulings on qualified immunity, stressing that "[t]he qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (quoting *Malley*, 475 U.S. at 343, 341).

Furthermore, the court of appeals also failed to address conflicting decisions that had upheld claims of qualified immunity in similar circumstances over the same general period. In *Foster*, for example, the plaintiffs brought suit against city officials who were alleged to have concealed and suppressed evidence to hinder plaintiffs' action for wrongful death against the city. The Fifth Circuit concluded that whether or not plaintiffs' subsequent lawsuit stated a proper constitutional claim for denial of access to the courts, they were entitled to assert qualified immunity because the contours of any such right in the late 1980s "could best be described as 'nebulous,'" even in light of several decisions that had already been issued by that

court. 28 F.3d at 430 (quoting *Crowder*, 884 F.2d at 811); *see also Ryland*, 708 F.2d at 975-76 (recognizing defendants may be entitled to qualified immunity on access-to-courts claim).

Nothing significant is alleged to have occurred between the late 1980s and the early 1990s to cause the law suddenly to have become "clearly established" in this continually evolving area. Indeed, the *Foster* decision upholding qualified immunity was issued late in 1994. Accordingly, if the Court declines to grant summary reversal on the qualified immunity issue, the square conflict between *Foster* and the ruling below warrants plenary review.

The core problem here is that the regime of qualified immunity laid down by the court below is untenably strict. Public officials located in the District of Columbia can now be held personally liable for making the wrong guesses in gray areas of the law, and not simply for transgressing bright lines. Yet qualified immunity has been designed to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. "The reasonable actor must have known that the conduct violated a clearly-established right; not that, in some sense, he was doing something wrong." *Foster*, 28 F.3d at 430. The court of appeals here failed to heed this Court's repeated warning that public officials are not "expected to predict the future course of constitutional law." *Procunier*, 434 U.S. at 562; *see also Wilson*, 526 U.S. at 617-18; *Mitchell*, 472 U.S. at 535. Either summary reversal or a grant of *certiorari* is necessary in this case to reinforce that ostensibly clear message to the lower courts once again.

IV. IF ALLOWED TO STAND, THE RULING BELOW WOULD HAVE PROFOUNDLY ADVERSE CONSEQUENCES FOR THE CONDUCT OF OUR FOREIGN POLICY AND THE UTILITY OF AMERICAN INTELLIGENCE EFFORTS.

The practical consequences of the ruling below in this case are alarming. Whenever government officials are alleged to have misrepresented or concealed information they are under no

duty to provide, and their alleged motivation is at least in part to avoid or forestall a lawsuit, a constitutional violation can be stated as long as the plaintiff manages to set out a hypothetical claim for a particular form of relief that has been prejudiced somehow. This sweeping formulation of the constitutional right of access to the courts is problematic in at least four respects.

First, in any case where the plaintiff can claim that he or she would have brought some form of action for injunctive relief, which by definition involves immediate allegations of irreparable harm, the misstatement or concealment of pertinent information by government officials would give rise to a viable constitutional claim. Such cases could be frequent, especially since potential plaintiffs often believe that those whom they contemplate suing have not been candid with them.

Second, the approach adopted by the court below sweeps into its orbit any situation where the official may be acting with mixed motivations or for multiple purposes. The alleged "disinformation" allegedly offered by officials to discourage a lawsuit might also, or primarily, have been provided to achieve other objectives, such as preserving the secrecy of government deliberations, of sensitive activities, or even of covert operations. Yet in many instances the plaintiff will be able plausibly to allege that "*one* of their express objectives" was to prevent a lawsuit. Pet. App. 23a (emphasis added).

Third, all of these concerns are exacerbated by the qualified immunity holding below, which adds to these undesirable effects the cloud of potential personal liability in damages. That unappetizing prospect would necessarily have to be weighed by government officials whenever they respond to requests for information or engage in public discussions on any serious topics of public or private concern.

Fourth, the ruling under review in this case was issued by the federal court of appeals in the nation's capital, and was upheld, over the protests of two dissenting judges, by the entire court voting *en banc*. Aside from this Court, that tribunal is the controlling authority for the venue encompassing the most senior federal officials who conduct foreign affairs as well as key

personnel involved in American intelligence efforts. The chilling effect of this decision on their future conduct in these delicate areas can hardly be overestimated.

In fact, this case is illustrative, for petitioners are alleged to have misrepresented and concealed information in part to avoid or forestall a lawsuit, where undoubtedly if they did so at all, they did so principally or even entirely to protect the confidentiality of covert foreign intelligence operations and sources. There may be many arguable grounds for evaluating the appropriate means and ends of such operations, but there is little reason to believe that airing those details in constitutional lawsuits brought by individual citizens in the federal courts is the proper forum for pursuing such efforts. All of these practical reasons militate in favor of granting review here.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of *certiorari*, and either summarily reverse the judgment below or set the case for plenary review.

Respectfully submitted,

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September 2001

APPENDIX

TABLE OF CONTENTS

PAGE

Opinion of the Court of Appeals, December 12, 2000..... 1a

Opinion of the District Court, March 23, 1999 .....30a

Order of the District Court, March 23, 1999 .....58a

Order and Judgment of the District Court,
August 9, 1999 .....60a

Order of the Court of Appeals Denying Petition
for Rehearing, April 6, 2001 .....61a

Order of the Court of Appeals Denying Petition
for Rehearing En Banc, April 6, 2001 .....69a

Letter from William K. Suter, Clerk of the Court
to Hon. Theodore B. Olson, June 28, 2001.....72a

Letter from William K. Suter, Clerk of the Court
to Hon. Theodore B. Olson, July 31, 2001 .....73a

APPENDIX A

Jennifer K. HARBURY, Appellant,
v.
John M. DEUTCH, et al., Appellees.

No. 99-5307.

United States Court of Appeals,
District of Columbia Circuit.

Argued Sept. 8, 2000.
Decided Dec. 12, 2000.
As Amended Dec. 12, 2000.

Appeal from the United States District Court for the District of Columbia (No. 96cv00438).

Jodie L. Kelley argued the cause for appellant. With her on the briefs were Paul Hoffman, Beth Stephens and Jennifer M. Green. Maureen F. Del Duca entered an appearance.

R. Craig Lawrence, Assistant U.S. Attorney, argued the cause for appellees. With him on the brief was Wilma A. Lewis, U.S. Attorney.

Before: EDWARDS, Chief Judge, GINSBURG and TATEL, Circuit Judges.

Opinion for the Court filed by Circuit Judge TATEL.

TATEL, Circuit Judge:

Jennifer Harbury claims that for about one and a half years in the early 1990s, Central Intelligence Agency officials participated in the torture and murder of her husband, a Guatemalan citizen. She also claims that while he was being

tortured and for more than a year and a half after his death, State Department and National Security Council officials systematically concealed information from her and misled her about her husband's fate. Seeking, among other things, damages under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), she filed suit in federal court, claiming deprivation of her husband's Fifth Amendment due process rights, violation of her right to familial association, and interference with her right of "access to courts." The district court dismissed these actions, finding that Harbury had failed to allege the deprivation of any actual constitutional rights, and that even if she had, defendants were entitled to qualified immunity. We agree with the district court as to Harbury's Fifth Amendment and familial association claims. But because we find that she has stated a valid claim for deprivation of her right of access to courts, and because the NSC and State Department officials are not entitled to qualified immunity on this claim, we reverse and remand for further proceedings.

I

Since this appeal comes here on a motion to dismiss, we accept the facts as alleged in the complaint. *See Moore v. Valder*, 65 F.3d 189, 192 (D.C. Cir. 1995). Emphasizing that defendants have not yet answered Harbury's charges and that her claims have been subject to neither discovery nor cross-examination, we set out the facts as she pleads them, borrowing liberally from her complaint.

In 1991, Harbury, an American citizen, married Efrain Bamaca-Velasquez, a Guatemalan citizen and high-ranking member of the Guatemalan National Revolutionary Union, a Guatemalan rebel organization. Several months after their Texas wedding, Bamaca returned to Guatemala where, on or around March 12, 1992, he disappeared. The Guatemalan army

reported that during a skirmish with its troops, Bamaca committed suicide and was buried nearby. This was false. In fact, Bamaca had been captured and secretly detained by members of the Guatemalan military, including, Harbury alleges, CIA "assets" – members of Guatemalan Security Forces or Intelligence Services paid by the CIA to obtain information about the Guatemalan resistance.

According to the complaint, over the next twelve to eighteen months, Bamaca's captors psychologically abused and physically tortured him. They chained and bound him naked to a bed, beat and threatened him, and encased him in a fullbody cast to prevent escape. Eventually, probably some time around September of 1993, they executed him.

About a year after Bamaca disappeared, in early 1993, Harbury learned from a prisoner who had escaped from a Guatemalan interrogation camp that her husband was alive and being tortured. Harbury immediately contacted several State Department officials, reported what she had learned, and asked for information about her husband's status. Although officials to whom she spoke promised to look into the matter, they never provided her with any information.

In August 1993, Harbury obtained permission to open Bamaca's grave. Discovering that the body there was not his, she immediately informed Marilyn McAfee, the U.S. Ambassador to Guatemala. Although the Ambassador told Harbury that she would investigate the matter and report her findings, she too never provided Harbury with any information.

Over the next year, from October 1993 to October 1994, Harbury met repeatedly with State Department officials. Saying they were concerned about Bamaca's situation, these officials reassured her they were seriously looking into the matter and told her the Guatemalan Military had informed them

that it did not have (and had never had) custody of Bamaca.

In October of 1994, the CBS news program 60 Minutes reported that the U.S. Embassy in Guatemala had an intelligence report confirming that Bamaca had been captured alive. In response, the State Department publicly confirmed Bamaca's capture, stating that he had been lightly but not seriously wounded and held prisoner for some time. The State Department also reported that it had no information confirming that Bamaca was still alive.

In the wake of the 60 Minutes report and the State Department's public statements, Harbury met with National Security Advisor Anthony Lake, who told her that the government had "scraped the bottom of the barrel" for information about her husband and that no further information existed. Complaint ¶ 83. He promised that the government would not only continue searching for information, but also keep Harbury informed. Other State Department and NSC officials likewise told her that they had no concrete information about Bamaca's condition, but that they were continuing to assume that he was still alive. Suspecting that State and NSC officials were withholding information, Harbury filed a Freedom of Information Act request. Despite expedited processing, she received no documents in the following months.

Finally, because of the "failure of the [State Department and NSC] defendants to inform her of her husband's fate," Harbury announced that she would begin a hunger strike in front of the White House on March 12, 1995, the third anniversary of her husband's disappearance. Complaint ¶ 87. State Department and NSC officials then met with her again, telling her this time that they believed Bamaca was dead because so many years had passed without evidence that he was alive. Unconvinced, Harbury began her hunger strike. Twelve days into the strike, Congressman Robert Torricelli announced

publicly that years earlier, Bamaca had been killed at the order of a paid CIA asset.

On her own behalf and as administratrix of Bamaca's estate, Harbury brought suit in the U.S. District Court here against various named and unnamed officials of the CIA, the State Department, and the NSC. She based her claims on two broad factual allegations. First, she alleged that CIA officials at all levels "knowingly engaged in, directed, collaborated and conspired in, and otherwise contributed to [her husband's] secret imprisonment, torture and extrajudicial murder." Complaint ¶ 49. Many of the Guatemalan military officers who tortured and killed Bamaca, she alleged, were paid CIA agents. Two had been trained in torture and interrogation techniques at the School of the Americas, a U.S. Army facility located in Georgia. According to Harbury, CIA officials who did not participate directly in Bamaca's torture not only paid Agency assets for information about Bamaca's rebel organization, knowing that the information had been extracted through torture, but also requested further intelligence, knowing it too would be obtained in the same manner. And as a general matter, Harbury alleged that CIA officials knew of other gross human rights violations in Guatemalan interrogation centers – including beatings with cement blocks, burials of prisoners alive, and electrical shocks to the testicles and legs – and that CIA officials up the chain of command, from the operations and intelligence divisions to the Director himself, expressly authorized their assets to use torture to obtain information from Guatemalan rebel leaders.

Second, Harbury alleged that while Bamaca was still alive, State Department and NSC officials, including Ambassador McAfee and NSA Lake, made "fraudulent statements and intentional omissions" that prevented her from "effectively seeking adequate legal redress, petitioning the appropriate government authorities, and seeking to publicize her

husband's true plight." Complaint ¶ 98. According to the complaint, when Harbury first contacted State Department officials to follow up on what she had learned from the escaped prisoner, they actually knew that her husband was alive and being tortured. They knew this, she alleged, because a week after Bamaca's capture, the CIA informed both State Department and White House officials that Guatemalan military forces would "probably fabricate his combat death in order to maximize their ability to extract information from [him]." *Id.* at ¶¶ 35, 56-57. Yet State Department officials, including Ambassador McAfee, revealed none of this information to Harbury. Instead, they repeatedly reassured her that although they were investigating Bamaca's fate, they had discovered nothing. According to Harbury, internal memoranda distributed and received by both State Department and NSC officials demonstrate their "intent to keep the involvement of the U.S. Government in the detention, torture, and execution of Mr. Bamaca out of the public eye." *Id.* at ¶ 69. Those officials, she alleged, "intentionally misled [Harbury], through their deceptive statements and omissions, into believing that concrete information about her husband's fate did not exist because they did not want to threaten their ability to obtain information from Mr. Bamaca," and because they feared that if they disclosed information to Harbury or anyone else, "they could then be subject to public embarrassment, censure, and/or legal liability." *Id.* at ¶¶ 67-69.

After Bamaca's death, the pattern of deception and nondisclosure allegedly continued. Although the Defense Intelligence Agency reported in September 1993 to the State Department, the White House, and the U.S. Embassy in Guatemala that Bamaca had been killed, all officials Harbury met with during the following months, including NSA Lake, continued to lead her to believe not only that her husband was alive, but also that they were doing all they could to learn more about him. "[A]t no time," she alleged, did these officials

inform her that "they were unwilling to investigate her case or to give her information about her husband's situation. Instead, a decision was made to neither share the information with her, nor inform her of the existence of such information." *Id.* at ¶ 77.

Based on these factual allegations, Harbury pleaded 28 specific causes of action, including (1) claims against defendants in their official capacities seeking a declaratory judgment that their conduct was unconstitutional, as well as an injunction preventing the CIA from extracting information through torture and preventing the State Department and NSC from concealing information about CIA torture victims; (2) *Bivens* actions against defendants in their individual capacities seeking damages for their alleged constitutional violations; (3) common law tort claims against individual defendants, including claims for intentional infliction of emotional distress and wrongful death; and (4) claims against individual defendants for violations of international law. Only Harbury's *Bivens* claims are directly at issue in this appeal. These claims rest on three alleged constitutional violations: (1) by contributing to Bamaca's torture, CIA defendants violated his Fifth Amendment substantive due process rights; (2) by participating in and concealing information about Bamaca's torture and murder, all defendants violated Harbury's constitutional right to familial association; and (3) by concealing information and misleading her about her husband's fate, NSC and State Department defendants violated her right of access to courts.

The district court dismissed Harbury's *Bivens* claims, finding with respect to each not only that she failed to allege a deprivation of an actual constitutional right, but also that even if she had, defendants were entitled to qualified immunity because the scope of the alleged right was not clearly established. Pursuant to Federal Rule of Civil Procedure 54(b), the district court certified its dismissal of Harbury's *Bivens*

claims as final. We review *de novo* a dismissal for failure to state a claim upon which relief can be granted, accepting the facts as alleged in the complaint. *See Moore*, 65 F.3d at 192. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

II

Harlow v. Fitzgerald holds that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Following *Harlow* and abiding by the familiar practice of avoiding unnecessary adjudication of constitutional questions, many courts faced with claims resting on constitutional rights of uncertain scope have dismissed cases based on qualified immunity alone. *See, e.g., Childress v. Small Bus. Admin.*, 825 F.2d 1550, 1552 (11th Cir. 1987). In other words, "assum[ing], arguendo, without deciding" that a constitutional right in fact exists, courts have asked whether the right is clearly established. *See id.*

The Supreme Court cast doubt on this approach in *Wilson v. Layne*: "A court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." 526 U.S. 603, 609, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) (internal quotation omitted). As the Court had previously recognized, "if the policy of avoidance [of unnecessary adjudication of constitutional

issues] were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals." *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998).

Notwithstanding *Wilson*, the Government urges us to dispose of this case based on qualified immunity without reaching the merits of Harbury's underlying claims. In support of this argument, it cites our recent decision in *Kalka v. Hawk*, 215 F.3d 90 (D.C. Cir. 2000), where the district court had dismissed a complaint brought by a federal prisoner claiming that the Bureau of Prisons had denied him his First Amendment right to practice secular humanism. Without reaching the merits of Kalka's constitutional claim, we affirmed based on qualified immunity alone. The Supreme Court's concern that the scope of the underlying constitutional right would never be adjudicated, we held, had "little force when injunctive relief against the official's actions is potentially available." *Id.* at 97. Although Kalka's own claim for injunctive relief had become moot (he had been released from prison during his appeal), "there is still the potential that other prisoners who practice humanism may bring such suits and settle the question whether humanism . . . is a religion within the First Amendment. This possibility of injunctive actions satisfies the Court's desire for 'clarity in the legal standards for official conduct.'" *Id.* (quoting *Wilson*, 526 U.S. at 609, 119 S.Ct. 1692).

In certain respects, this case does resemble *Kalka*. Like Kalka, Harbury alleges that the challenged government conduct is ongoing: in a part of her suit not before us, Harbury claims that the government still extracts information through torture and covers up information about the victims. Also like Kalka, Harbury herself is no longer subject to the challenged conduct: Bamaca's torture ended with his death, and sufficient facts

about U.S. involvement in his treatment have come to light to enable Harbury to seek legal relief.

At this point, however, the similarities with *Kalka* end. Harbury has been able to challenge the conduct of the government only because its cover-up failed. If the cover-up had succeeded, Harbury would have learned neither of CIA involvement in her husband's torture nor of NSC and State Department attempts to keep that involvement secret. Thus, unlike in *Kalka*, where future secular humanist prisoners could seek injunctive relief for denial of First Amendment rights (so long as they remained incarcerated), the very nature of the conduct Harbury challenges renders unlikely the possibility of injunctive relief: another spouse in Harbury's position could challenge her husband's torture only if she learned of the torture before it ended. In essence, the Government asks us to defer adjudication of the constitutionality of its alleged conduct until it again fails in a cover-up, this time before the victim dies. Nothing in *Kalka* requires such a preposterous result.

Applying *Wilson*, then, we must address the validity of Harbury's constitutional allegations before reaching the question of qualified immunity. It is to that task that we now turn.

Fifth Amendment

Government conduct that "shocks the conscience" violates the Fifth Amendment guarantee against deprivation of "life, liberty, or property, without due process of law." *See Rochin v. California*, 342 U.S. 165, 172-73, 72 S.Ct. 205, 96 L.Ed. 183 (1952). No one doubts that under Supreme Court precedent, interrogation by torture like that alleged by Harbury shocks the conscience. *See id.* at 172, 72 S.Ct. 205 (interrogation methods were "too close to the rack and the screw to permit of constitutional differentiation"); *Palko v. Connecticut*, 302 U.S. 319, 326, 58 S.Ct. 149, 82 L.Ed. 288

(1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969) (noting that the Due Process Clause must at least "give protection against torture, physical or mental"). The difficult question, and the one presented by this case, is whether the Fifth Amendment prohibits torture of non-resident foreign nationals living abroad. Before reaching that question, however, we must consider Harbury's claim that because many of the CIA, NSC, and State Department officials who she says conspired to torture her husband did so within the United States, this case does not require extra-territorial application of the Fifth Amendment.

In support of this argument, Harbury cites *Cardenas v. Smith*, 733 F.2d 909 (D.C. Cir. 1984), which involved a Colombian citizen whose Swiss bank accounts were seized by Swiss authorities at the request of the U.S. Department of Justice. Despite the fact that the seized accounts were located in Switzerland, we suggested in dicta that the plaintiff might be able to establish injury within the U.S. by showing that her accounts were seized as a result of an unlawful conspiracy within the Justice Department. *Id.* at 913. Harbury also cites *Lamont v. Woods*, 948 F.2d 825 (2d Cir. 1991), which involved allegations that the U.S. Government violated the Establishment Clause of the First Amendment by giving grants to foreign religious schools. Even though the money was delivered and spent abroad, the court held that the alleged violation of the Establishment Clause was domestic because it occurred when the federal agency allocated the funds. *Id.* at 834.

Harbury fails to notice the relevance of *United States v. Verdugo-Urquidez*, 494 U.S. 259, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990), a case she cites later in her brief, where the Supreme Court held that a warrantless search and seizure of an alien's property in Mexico did not violate the Fourth Amendment. The search was conceived, planned, and ordered in the United States, carried out in part by agents of the United

States Drug Enforcement Agency, and conducted for the express purpose of obtaining evidence for use in a United States trial. *See id.* at 262-63, 110 S.Ct. 1056. Still, the Court treated the alleged violation as having "occurred solely in Mexico." *Id.* at 264, 110 S.Ct. 1056. In reaching this conclusion, the Court never mentioned that the search was both planned and ordered from within the United States. Instead, it focused on the location of the primary constitutionally significant conduct at issue: the search and seizure itself.

We think *Verdugo-Urquidez* controls this case. Like the warrantless search there, the primary constitutionally relevant conduct at issue here – Bamaca's torture – occurred outside the United States. The same was not true in *Lamont*. And *Cardenas*, on which Harbury also relies, was decided prior to *Verdugo-Urquidez*. We thus turn to Harbury's primary claim – that Bamaca was entitled to Fifth Amendment protection even though the torture occurred in Guatemala.

Acknowledging that aliens are entitled to fewer constitutional protections than citizens, *see Mathews v. Diaz*, 426 U.S. 67, 77-79, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976), and that constitutional protections (even for citizens) diminish outside the U.S., *see Verdugo-Urquidez*, 494 U.S. at 270, 110 S.Ct. 1056, Harbury argues that the Constitution's most fundamental protections, like the Fifth Amendment prohibition of torture, apply even to foreign nationals located abroad. In support of this claim, she cites three lines of cases holding that non-citizens outside the United States enjoy constitutional rights. First, courts have held that inhabitants of nonstate territories controlled by the U.S. – such as unincorporated territories or occupation zones after war – are entitled to certain "fundamental" constitutional rights. *See Examining Bd. of Eng'rs., Architects & Surveyors v. Otero*, 426 U.S. 572, 599 n.30, 96 S.Ct. 2264, 49 L.Ed.2d 65 (1976); *Balzac v. Porto Rico*, 258 U.S. 298, 312-13, 42 S.Ct. 343, 66 L.Ed. 627 (1922);

United States v. Tiede, 86 F.R.D. 227, 242-44 (U.S.Ct.Berlin 1979). Courts have also held that excludable aliens – aliens apprehended outside the U.S. while attempting to cross the border and held within the U.S. pending trial – likewise enjoy basic due process rights against gross physical abuse. *See Amanullah v. Nelson*, 811 F.2d 1, 9 (1st Cir. 1987), *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987). Finally, courts have suggested that non-resident aliens abducted by the government for trial within the United States have basic due process rights. *See United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974); *see also United States v. Lambros*, 65 F.3d 698, 701 (8th Cir. 1995).

Although these cases demonstrate that aliens abroad may be entitled to certain constitutional protections against mistreatment by the U.S. Government, we do not agree that they establish that Bamaca's torture ran afoul of the Fifth Amendment. To begin with, in adjudicating the application of constitutional rights to aliens, the Supreme Court has looked – among other factors – to whether the aliens have "come within the territory of the United States and developed substantial connections with this country." *See Verdugo-Urquidez*, 494 U.S. at 271, 110 S.Ct. 1056. In all three sets of cases Harbury cites, the aliens had a substantially greater connection to the U.S. than Bamaca. The excludable alien cases involved persons physically present in the U.S. The occupation zone cases involved foreign nationals under de facto U.S. political control. And although the alien in *Toscanino* had been tortured in a foreign country, he was abducted to and tried in the United States. In fact, the Second Circuit, treating the torture and abduction as part of the pre-trial process, focused on the fact that allowing the government to seize and torture defendants before bringing them to trial would threaten the integrity of the United States judicial process. *See Toscanino*, 500 F.2d at 275-79. In contrast to the aliens involved in these cases, Bamaca was not physically present in the United States, not

tortured in a country in which the United States exercised de facto political control, and not abducted for trial in a United States court.

Even if the cases Harbury cites were not so easily distinguishable, this issue would also be controlled by *Verdugo-Urquidez*. Though that case involved extraterritorial application of the Fourth Amendment, the Court also dealt with the extraterritorial application of the Fifth:

> Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States. In *Johnson v. Eisentrager* . . . the Court held that enemy aliens arrested in China and imprisoned in Germany after World War II could not obtain writs of habeas corpus in our federal courts on the ground that their convictions for war crimes had violated the Fifth Amendment. . . . The *Eisentrager* opinion acknowledged that in some cases constitutional provisions extend beyond the citizenry; "the alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society." But our rejection of the extraterritorial application of the Fifth Amendment was emphatic:
>
> > "Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. . . . None of the learned commentators on our Constitution has

> > even hinted at it. The practice of every modern government is opposed to it."

Id. at 269, 110 S.Ct. 1056 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 770, 784-85, 70 S.Ct. 936, 94 L.Ed. 1255 (1950)). To be sure, as Harbury points out, this language is dicta. But it is firm and considered dicta that binds this court. *See, e.g., United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997) ("[c]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative") (internal quotation omitted). Harbury also correctly observes that *Eisentrager* – the case relied on by *Verdugo-Urquidez* – concerned rights of enemy aliens during wartime. But the Supreme Court's extended and approving citation of *Eisentrager* suggests that its conclusions regarding extraterritorial application of the Fifth Amendment are not so limited. For these reasons, we agree with the district court that Harbury failed to allege a valid claim for deprivation of her husband's Fifth Amendment due process rights.

Familial Association

The Constitution protects familial relationships from unwarranted government interference in at least two circumstances. First, parents have a right to maintain their relationship with their children. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (holding that a state must support allegations of parental neglect with at least clear and convincing evidence before terminating the rights of parents in their natural child); *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) (striking down a law automatically making children of unwed fathers wards of the State upon the death of their mother). Second, family members have a constitutional right to make certain private decisions regarding family affairs, such as whether to procreate, *see Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)

(abortion), *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (contraception), or whether to send children to public school, *see Pierce v. Soc'y of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). Harbury's claims rest on both categories of rights.

Relying on the first category, Harbury argues that by murdering Bamaca, CIA defendants unconstitutionally deprived her of her right to continuing association with her husband. The district court dismissed this claim because Harbury failed to allege that the defendants murdered Bamaca for the purpose of ending her marriage. Urging us to reverse, Harbury argues that the district court's purpose requirement conflicts with Supreme Court cases finding due process violations in circumstances involving far less serious interference with familial relationships – such as laws requiring children to attend public schools – and no direct purposeful interference with the family. To be sure, these cases involve the second category of rights – the right to make private familial decisions – but Harbury argues that there is no principled reason to impose a purpose requirement in the first category and not the second. Harbury also argues that since officials will likely never kill anyone for the purpose of terminating a marriage, a purpose requirement effectively eviscerates familial association claims based on wrongful killings.

Our sister circuits have split on whether familial association claims require allegations of purposeful interference. Some circuits have held that the Due Process Clause only protects against direct, intentional interference with familial relationships. In *Ortiz v. Burgos*, for example, the First Circuit held that the stepfather and siblings of a prisoner beaten to death by guards had no independent cause of action for loss of familial association because the beating was not specifically intended to deprive them of their association with the decedent. 807 F.2d 6, 8 (1st Cir. 1986); *see also Shaw v. Stroud*, 13 F.3d 791,

804-05 (4th Cir. 1994); *Harpole v. Arkansas Dep't of Human Servs.*, 820 F.2d 923, 927-28 (8th Cir. 1987); *Trujillo v. Bd. of County Comm'rs.*, 768 F.2d 1186, 1189-90 (10th Cir. 1985). But other circuits have held in cases of wrongful killings of children that the surviving parent had an independent due process claim, even though the killing was not specifically intended to disrupt the parent-child relationship. In one such case, *Bell v. City of Milwaukee*, the Seventh Circuit held that the father (but not the siblings) of a decedent wrongfully killed by the police had a constitutional claim for loss of association with his son even though the killing was motivated by racism, not intent to deprive him of his son's companionship. 746 F.2d 1205, 1242-48 (7th Cir. 1984); *see also Smith v. City of Fontana*, 818 F.2d 1411, 1417-20 (9th Cir. 1987); *Estate of Bailey v. County of York*, 768 F.2d 503, 509 n.7 (3d Cir. 1985).

In considering Harbury's claim, we are mindful of the caution we must exercise in expanding the liberty interests protected by substantive due process. "As a general matter," the Supreme Court said in *Collins v. Harker Heights*, "[we have] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. The doctrine of judicial self- restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." 503 U.S. 115, 125, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) (citation omitted).

Bearing this caution in mind, as well as the obvious proposition that it operates with even greater force on the lower federal courts, we think that two features of Supreme Court precedent bar us from accepting Harbury's claim. First, although the Court has never directly addressed the issue in the context of a wrongful killing, it has found a constitutional right to continuing association with family members only in cases involving direct, purposeful interference with familial

relationships. *See, e.g., Stanley*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551; *Santosky*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599. As the First Circuit observed, the Court has "never held that governmental action that affects the parental relationship only incidentally . . . is susceptible to challenge for a violation of due process." *Ortiz*, 807 F.2d at 8. Equally significant, the Supreme Court has recognized a right to continuing familial association only in cases involving parent-child relationships. In doing so, the Court has emphasized the importance of the parent-child bond. *See, e.g., Stanley*, 405 U.S. at 651, 92 S.Ct. 1208 (noting that the Court had previously deemed the rights to conceive and raise one's children as " essential," "basic," and "far more precious . . . than property rights"); *Santosky*, 455 U.S. at 753, 102 S.Ct. 1388 (referring to the "fundamental liberty interest of natural parents in the care, custody, and management of their child," and to parents' "vital interest in preventing the irretrievable destruction of their family life"). Even circuit court cases that have expanded the right to include indirect deprivations of association involve only parent-child relationships. *See Bell*, 746 F.2d at 1242-48; *Smith*, 818 F.2d at 1417-20; *Estate of Bailey*, 768 F.2d at 509 n.7. And in one such case, *Bell*, the court expressly declined to broaden the right to include the decedent's surviving siblings. *See* 746 F.2d at 1245-48.

Harbury's claim thus lies beyond Supreme Court precedent in not one but two respects: it concerns neither a parent-child relationship nor purposeful interference with a familial relationship. On the facts of this case, therefore, we need not decide whether the constitutional right to continuing familial association requires allegations of purpose to interfere with the right, nor whether the constitutional right to familial association extends to the marriage relationship. We hold only that in view of Supreme Court precedent and in light of the Court's admonition in *Collins*, we cannot extend a constitutional right to familial association to cases where, as

here, the government has indirectly interfered with a spousal relationship. The First Circuit, declining to extend due process protection to incidental deprivations of familial association, used language we think particularly compelling:

> Although we recognize and deplore the egregious nature of the alleged government action in this case, we hesitate, in the rather novel context of this case, to erect a new substantive right upon the rare and relatively uncharted terrain of substantive due process when case law, logic and equity do not command us to do so. It does not necessarily follow that the incidental deprivation of even a natural parent's parental rights is actionable simply because the relevant deprivation of life is shocking. In addition, a conclusion that governmentally caused termination of, or encroachment on, the parental interest in the continued relationship with a child always is actionable would constitutionalize adjudication in a myriad of situations we think inappropriate for due process scrutiny, including the alleged wrongful prosecution and incarceration of a child or the alleged wrongful discharge of a child from a state job, forcing the child to seek employment in another part of the country. Moreover, the problem of giving definition and limits to a liberty interest in this vast area seems not only exceedingly difficult but to a considerable extent duplicative of the widespread existence of state causes of action, as in this case, which provide some compensation to grieving relatives.

Ortiz, 807 F.2d at 9. Emphasizing that it sought "neither to

minimize the loss of a family member nor to denigrate the fundamental liberty interest in matters of family life that has long been a part of our constitutional fabric," the First Circuit concluded: "even an interest of great importance may not always be entitled to constitutional protection. . . . Our conclusion is simply that, in light of the limited nature of the Supreme Court precedent in this area, it would be inappropriate to extend recognition of an individual's liberty interest in his or her family or parental relationship to the facts of this case." *Id.* at 9-10 (citations omitted). For essentially similar reasons, we are doubly reluctant to make the even broader expansion of the right to familial association sought by Harbury.

Harbury's second familial association claim, this one brought against State Department and NSC defendants, charges that their failure to disclose information about Bamaca violated her right to make intimate personal decisions about her marriage. To support this claim, she cites *Planned Parenthood v. Casey*, where the Supreme Court stated that decisions within the "private realm of family life" are among "the most intimate and personal choices a person may make in a lifetime," and are "central to the liberty protected by the Fourteenth Amendment." 505 U.S. 833, 851, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). Relying on this broad language, Harbury asserts that she had a due process right to decide how best to save her husband from torture and retrieve his remains and bury him after he died. Defendants, she urges, prevented her from making these decisions by concealing information about his torture and death.

We agree with the district court that Harbury's claim lacks foundation in constitutional jurisprudence. The broad general principle Harbury cites appears never to have been applied to a situation even remotely like hers. Nor does she explain why it should be. We therefore decline to extend the right in the manner she proposes.

III

This brings us to our only area of disagreement with the district court: Harbury's access to courts claim. "[T]he right to sue and defend in the courts," the Supreme Court long ago said, "is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship." *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148, 28 S.Ct. 34, 52 L.Ed. 143 (1907). The right not only protects the ability to get into court, *see, e.g., Ex parte Hull*, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941) (striking down a prison regulation prohibiting prisoners from filing petitions for habeas corpus unless they are found "properly drawn" by a state official), but also ensures that such access be "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977).

Applying this standard, several of our sister circuits have found that government cover-ups can infringe the right of access to courts. In *Bell*, 746 F.2d 1205, for example, city police officers planted evidence and contrived a false story to make their killing of an unarmed man whom they shot in the back seem an act of self-defense. The victim's father filed a wrongful death action against both the officer and the city, but the case settled for an amount so small that the father never cashed the check. When the true facts of the killing emerged twenty years later, the victim's survivors sued the police, alleging that the conspiracy to conceal the facts had interfered with their ability to seek legal redress. Sustaining a jury verdict for plaintiffs, the Seventh Circuit found that "[t]hough [Bell's father] filed a wrongful death claim in state court soon after the killing, the cover-up and resistance of the investigating police officers rendered hollow his right to seek redress. . . ." *Id.* at 1261.

The Fifth Circuit reached a similar result in *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), recognizing a potential denial of the right of access when an alleged cover-up delayed release of the facts of a murder for eleven months. Noting that "[d]elay haunts the administration of justice," the court held that the victim's parents could state a denial of access claim since "[t]he defendants' actions could have prejudiced [their] chances of recovery in state court because the resulting delay would cause stale evidence and the fading of material facts in the minds of potential witnesses." *Id.* at 974, 975; *see also Swekel v. City of River Rouge*, 119 F.3d 1259, 1263-64 (6th Cir. 1997) (plaintiff must "[show] that the defendants' actions foreclosed her from filing suit in state court or rendered ineffective any state court remedy she previously may have had"); *Delew v. Wagner*, 143 F.3d 1219, 1222 (9th Cir. 1998) (same); *Vasquez v. Hernandez*, 60 F.3d 325, 329 (7th Cir. 1995) (plaintiffs must allege either that they have "been prevented from pursuing a tort action in state court or that the value of such an action has been reduced by the cover-up"); *cf. Barrett v. United States*, 798 F.2d 565, 575 (2d Cir. 1986) ("Unconstitutional deprivation of a cause of action occurs when government officials thwart vindication of a claim by violating basic principles that enable civil claimants to assert their rights effectively.").

Citing *Bell*, *Ryland*, and other similar cases, Harbury argues that NSC and State Department defendants, by giving her "false and deceptive information related to her husband and otherwise concealing whether he was alive, . . . deprived Plaintiff of her right . . . to adequate, effective, and meaningful access to the courts." Complaint ¶ 174. The Government responds that Harbury "failed to identify a . . . constitutional right to have federal officials report on what they knew about a foreign revolutionary leader captured by a foreign government on the field of battle." Appellee's Br. at 14. According to the Government, this failure distinguishes Harbury's case from *Bell* and other cases where police officers charged with investigating

a crime destroy, conceal, or manufacture evidence in violation of statutory duties.

We think the Government misreads Harbury's complaint. She never alleges that defendants breached a duty to disclose information to her. Rather, she alleges that they affirmatively deceived her into believing that they were actively seeking information about her husband. Instead of saying (as they could have) that they were unable to discuss Bamaca's situation, they sought to lull her into believing that they were working on her behalf, intending to prevent her from suspecting that the U.S. Government was actually involved in Bamaca's torture. One of their express objectives, Harbury alleges, was to prevent her from suing them. Viewed this way, and regardless of whether State and NSC officials had an affirmative duty to provide information to Harbury in the first place, the complaint states a clear case of denial of access to courts. *Cf. Barrett*, 798 F.2d 565, 575 (though defendant government officials "were not under any duty to volunteer to the estate information that would alert it to the existence of a claim against the federal government and certain of its officials . . . government officials were not free to arbitrarily interfere with the estate's vindication of its claims").

The district court, though agreeing that Harbury might be able to base an access to courts claim on the alleged cover-up, nevertheless dismissed her claim because she had not yet finished prosecuting the tort claims also pleaded in her complaint. In reaching this conclusion, the district court relied on *Swekel*, where the Sixth Circuit rejected an access to courts claim because the plaintiff had not yet filed suit in state court: "Before filing an 'access to courts' claim, a plaintiff must make some attempt to gain access to the courts; otherwise, how is this court to assess whether such access was in fact 'effective' and 'meaningful'?" 119 F.3d at 1264. The district court also cited *Delew*, 143 F.3d 1219, where the Ninth Circuit dismissed

an access to courts claim even though the plaintiff, unlike the plaintiff in *Swekel*, had actually filed a wrongful death action based on the same set of facts. Stating that "because the [plaintiffs'] wrongful death action remains pending in state court, it is impossible to determine" whether "the defendants' cover- up violated [the plaintiffs'] right of access to the courts by rendering 'any available state court remedy ineffective,'" the court gave plaintiffs leave to re-file "if in fact the defendants' alleged cover-up actually rendered all state court remedies ineffective." *Id.* at 1222-23.

In some ways this case does resemble *Swekel* and *Delew*. Like plaintiffs in those cases, Harbury alleges that due to the cover-up, "key witnesses . . . may now be dead or missing, . . . crucial evidence may have been destroyed, and . . . memories may have faded." *Harbury v. Deutch*, No. 96-00438 (D.D.C. filed Mar. 23, 1999) at 18. If her complaint rested solely on such allegations, we might agree with the district court. But Harbury's complaint goes further: not limited to wrongful death and intentional infliction of emotional injury, it alleges that but for the cover-up, she might have been able to save her husband's life. "As a result of the fraudulent statements and intentional omissions made by the Department of State and the [NSC] defendants . . . Plaintiff was unable to take appropriate actions to save her husband's life. Specifically, Plaintiff was foreclosed from effectively seeking adequate legal redress, petitioning the appropriate government authorities, and seeking to publicize her husband's true plight through the media." Complaint ¶ 98. Amplifying this point at oral argument, Harbury's counsel explained that if defendants had disclosed the information they possessed about Bamaca, Harbury could have sought an emergency injunction based on an underlying tort claim for intentional infliction of emotional distress. Even if the NSC and State Department officials had simply said they could not discuss Bamaca's situation, counsel explained, Harbury would have filed her FOIA requests

immediately, thus perhaps obtaining the information necessary to seek an injunction in time to save her husband's life. Instead, believing defendants' reassurances, Harbury waited for the State Department and NSC officials to complete their "investigation."

If Harbury's allegations are true, then defendants' reassurances and deceptive statements effectively prevented her from seeking emergency injunctive relief in time to save her husband's life. Because his death completely foreclosed this avenue of relief, nothing would be gained by requiring Harbury to postpone this aspect of her access to courts cause of action until she finishes prosecuting her tort claims.

The Government offers another reason for affirming the district court. Relying on *Swekel*, it argues that since Harbury "always had the option to file suit with or without information from any defendant," her claim should be dismissed based on her failure to file such a suit. *See* Appellee's Br. at 15 n.5 and accompanying text. But again, *Swekel* is very different from this case. There, police allegedly concealed the identity of a potential defendant involved in a fatal accident until after the statute of limitations had run. When the victim's spouse filed a deprivation of access to courts claim, the Sixth Circuit dismissed, observing that "[no] evidence . . . establishes that [plaintiff] even attempted to go to the state court in the first instance." *Swekel*, 119 F.3d at 1264. The trial court, moreover, had found that the plaintiff had been aware of all essential facts of the accident except the defendant's identity, and thus could have filed a "John Doe" suit despite the cover-up. *See id.* at 1261. Harbury, in contrast, asserts that she "had no idea that the United States Government was aware of, much less involved in, her husband's detention and torture." Thus "unaware that there was a potential claim of any kind against any U.S. officials," Harbury had "no reason to believe that she could state a claim in United States courts." Appellant's Reply Br. at 14. Unlike in *Swekel*, therefore, not only did defendants allegedly

deprive Harbury of any opportunity to seek relief in the courts, but they effectively concealed most of the "essential facts" of the case, including U.S. Government involvement, until after emergency injunctive relief would have been futile. *Cf. Swekel*, 119 F.3d at 1264 n.2 (recognizing that plaintiff need not file a prior suit if "it would be completely futile for a plaintiff to attempt to access the state court system").

Concluding that Harbury has pleaded an access to courts claim, however, does not end our task, for the district court also found that even if Harbury could bring such a claim, defendants would be entitled to qualified immunity. For purposes of qualified immunity, it is not enough for a plaintiff to allege that a defendant's conduct violated a right that is clearly established in general terms. Instead, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized . . . sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (citations omitted).

Applying this standard, the district court dismissed Harbury's access to courts claim because it includes no allegation of "nefarious conduct," such as manufacturing false evidence or destroying or refusing to collect evidence. *See Harbury*, No. 96-00438 at 19-20. Harbury claims only that defendants denied knowledge of Bamaca's torture and made "allegedly disingenuous overtures to assist her." *See id.* at 20. Because of this, and because State Department and NSC defendants did not conceal details about "local crimes" they were charged with investigating, but rather information about a "highranking commander of the Guatemalan National

Revolutionary Union resistance forces" who had been captured during an armed conflict with the Guatemalan army, the district court ruled that it "[could not] hold that Ambassador McAfee, NSA Lake, or the unnamed State Department and NSC defendants would have reasonably known that they [had to] be forthcoming in discussing the intelligence that they had received about Bamaca." *Id.* at 20-21.

We read Harbury's complaint quite differently. For one thing, as we have already shown, Harbury alleges not that defendants violated an affirmative duty to provide information, but that they affirmatively misled her. *See supra* at 608. Furthermore, defendants misled her, she alleges, precisely *because* they feared that if they gave her accurate information about Bamaca's fate, she might sue them. The relevant inquiry in Harbury's case, then, is this: would an objectively reasonable official have thought it clearly unconstitutional to affirmatively mislead Harbury for the express purpose of preventing her from filing a lawsuit? *Cf. Crawford-El v. Britton*, 951 F.2d 1314, 1317 (D.C. Cir. 1992).

–Before answering this question, we must dispose of the Government's argument that under *Harlow*, any inquiry into defendants' purpose in misleading Harbury is irrelevant to their qualified immunity defense. It is true that *Harlow* holds that an official's "subjective good faith" is irrelevant to evaluating a claim of qualified immunity. *See Harlow*, 457 U.S. at 815-19, 102 S.Ct. 2727. But we have understood *Harlow* principally to prevent inquiry into officials' knowledge or beliefs about the *legality* of their conduct. Except in national security cases – and the Government has not yet raised a national security defense in this case – we have not read *Harlow* to prohibit inquiry into an official's motives unrelated to knowledge of the law, when "a bad [motive] could transform an official's otherwise reasonable conduct into a constitutional tort." *See Crawford-El*, 951 F.2d at 1317; *see also Halperin v. Kissinger*, 807 F.2d 180, 186

(D.C. Cir. 1986) ("No court, as far as we are aware, has extended *Harlow*'s proscription of subjective inquiry beyond the issue of knowledge of the law and intent related to knowledge of the law, except in a national security context."). The Supreme Court, moreover, has not only confirmed that *Harlow* allows inquiry into intent unrelated to knowledge of the law, but also held that plaintiffs making constitutional claims based on improper motive need not meet any special heightened pleading standard. *See Crawford-El v. Britton*, 523 U.S. 574, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998).

Returning to the question before us – Should it have been clear to an objectively reasonable official that affirmatively misleading Harbury for the purpose of preventing her from filing a lawsuit would violate her constitutional rights? – we think the answer is plainly yes. Not only have five of our sister circuits held that cover-ups that conceal the existence of a cause of action (or make it difficult to prosecute one) infringe the constitutional right of access to courts, and not only are we unaware of any contrary decision, but we think it should be obvious to public officials that they may not affirmatively mislead citizens for the purpose of protecting themselves from suit. *Harlow* developed qualified immunity to protect public officials from "insubstantial lawsuits" that threatened to "[divert] official energy from pressing public issues" and "[deter] able citizens from acceptance of public office," as well as to ensure that these officials could exercise their discretion without fear of suit. *See Harlow*, 457 U.S. at 814, 102 S.Ct. 2727. Qualified immunity was never intended to protect public officials who affirmatively mislead citizens for the purpose of protecting themselves from being held accountable in a court of law. Joining our sister circuits, we therefore hold that when public officials affirmatively mislead citizens in order to prevent them from filing suit, they violate clearly established constitutional rights and thus enjoy no qualified immunity.

IV

In conclusion, we reiterate what we said at the outset: because the district court dismissed Harbury's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), our task is to assess neither the strength nor plausibility of Harbury's allegations, but to determine whether, assuming the truth of her allegations, "[she] can prove [any] set of facts in support of [her] claim which would entitle [her] to relief." *Conley*, 355 U.S. at 45- 46, 78 S.Ct. 99. Applying that standard, we reverse the district court's dismissal of Harbury's access to courts claim and remand for further proceedings. In all other respects we affirm.

So ordered.

APPENDIX B

Jennifer K. HARBURY, Plaintiff,
v.
John M. DEUTCH, et al., Defendants.

No. 96-00438 (CKK).

United States District Court,
for the District of Columbia.

MEMORÁNDUM OPINION

Jennifer Harbury, the widow of a Guatemalan rebel who was tortured and killed by Guatemalan army officers, has brought suit against the Central Intelligence Agency, the National Security Council, the State Department, and individual employees within each agency under the Constitution, state common law, and international law. Pending before the Court are the Defendants' motion to dismiss, Harbury's opposition thereto, and the Defendants' reply. For the reasons set forth below, the motion is granted in part and denied in part.

I. FACTS

Plaintiff Jennifer Harbury seeks monetary damages and declaratory and injunctive relief in connection with the alleged torture and execution in Guatemala of her husband, Efrain Bamaca-Velasquez ("Bamaca"). Plaintiff names as defendants the Central Intelligence Agency ("CIA"), the United States Department of State ("State Department"), the National Security Council ("NSC"), seventeen CIA employees, five State Department employees, two NSC employees, and unnamed employees at each agency. Plaintiff has sued the defendant employees in both their official and individual capacities.

The twenty-eight causes of action in the amended complaint fall into four broad categories: (1) claims for declaratory and injunctive relief for alleged constitutional violations; (2) constitutional claims under *Bivens* against the individual defendants in their individual capacities; (3) common-law tort claims against the individual defendants in their individual capacities; and (4) claims for violations of international law against the individual defendants in their individual capacities.

II. OFFICIAL CAPACITY CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF

The doctrine of sovereign immunity insulates the United States from suit except on such exact terms as Congress authorizes. *See Honda v. Clark*, 386 U.S. 484, 501 (1967). Within the ambit of sovereign immunity also fall cases in which the plaintiff seeks relief from government officials sued in their official capacities because such suits are considered to be directed against the sovereign itself. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991). Invoking this jurisdictional bar, the federal defendants claim that Harbury's request for declaratory and injunctive relief against officials in their official capacities mandates dismissal.

Although other problems plague Harbury's injunctive and declaratory-judgment actions, sovereign immunity is not one of them. What eludes the federal defendants is the well-recognized *Larson-Dugan* exception, which "holds that sovereign immunity does not apply as a bar to suits alleging that an officer's actions were unconstitutional or beyond statutory authority, on the grounds that 'where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions.'" *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996) (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949)); *see also Dugan v. Rank*, 372 U.S. 609, 621-23 (1963). Were it established that

the federal defendants acted beyond the limits that the Constitution imposes on them, Harbury could prosecute her claims for declaratory and injunctive relief without a waiver of sovereign immunity.

While sovereign immunity does not deprive this Court of subject-matter jurisdiction, Harbury's inability to establish standing does. Article III of the Constitution vests "[t]he judicial Power of the United States ... in one supreme Court, and in such inferior Courts as the Congress may ... establish." U.S. CONST. art. III, § 1. The judicial power that federal courts possess, however, is circumscribed to "cases" or "controversies." *See id.; see also Bennett v. Spear*, 117 S. Ct. 1154, 1161 (1997). To establish the "irreducible constitutional minimum of standing," *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996), a plaintiff must demonstrate that (1) she has suffered "injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), (2) the injury is "fairly traceable" to the defendant's actions, *see Bennett*, 117 S. Ct. at 1161, and (3) a favorable judicial ruling will likely redress the plaintiff's injury. *See id.* at 1161; *Lujan*, 504 U.S. at 560-61; *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426, 431 (D.C. Cir. 1998) (en banc). Taken together, these requirements are "core components' which are 'essential and unchanging parts of the case-or-controversy requirement of Article III.'" *National Treasury Employees Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996) (quoting *Lujan*, 504 U.S. at 560) (brackets omitted).

Harbury seeks, *inter alia*, an injunction enjoining "[d]efendants from taking such actions in the future." 2d Am. Compl. at 53 (Prayer for Relief ¶ (a)(iii)). As a practical matter, the requested injunction is so broad as to be nearly unintelligible – the fifty-three-page Second Amended Complaint enumerates

an extraordinary number of actions to which Harbury objects. After carefully examining Harbury's allegations and concerns, the Court construes her claims for equitable and declaratory relief in Counts 1-3, 6-9, 14, and 16 as a prayer for an injunction (1) enjoining the CIA from its alleged practices of extracting information through torture, purchasing information that has been extracted through torture, and maintaining foreign agents without regard for human rights abuses, *see* 2d Am. Compl. ¶¶ 104, 108, 113, 126, 131; and (2) enjoining the NSC and State Department from their alleged policies of providing false information regarding "the fate of anyone injured or killed through the CIA's long-standing policy ... related to the extraction of information" through torture. *See* 2d Am. Compl. ¶¶ 137, 143, 167, 179.

In seeking such a broad equitable decree, Harbury stakes her constitutional standing to a single perceived injury: that she "still has in-laws in Guatemala and wishes to someday return to live in Guatemala" and would be "at risk of suffering similar harms" from the CIA's alleged policies of securing information "through severe torture." *See* 2d Am. Compl. ¶ 96. Constitutional standing, however, requires the plaintiff to demonstrate that the harm that she seeks to enjoin be "*certainly* impending." *Lujan*, 504 U.S. at 564 n.2 (emphasis in original). As this Circuit recently observed, "[i]t is not enough for the [Plaintiff] to assert that [she] might suffer an injury in the future, or even that [she] is likely to suffer an injury at some unknown future time." *J. Roderick MacArthur Found. v. FBI*, 102 F.3d 600, 606 (D.C. Cir. 1996). Indeed, with language perfectly tailored to Harbury's claim that she "wishes to *someday* return to live in Guatemala," 2d Am. Compl ¶ 96, the D.C. Circuit has held that "[s]uch 'someday' injuries are insufficient." *MacArthur Found.*, 102 F.3d at 606.

Moreover, the Supreme Court's decision in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), underscores Harbury's

inability to press her claims for injunctive and declaratory relief. In *Lyons*, after nearly being strangled at the hands of police officers who inflicted a brutal chokehold, the plaintiff sought both damages and an injunction against the police department. Despite the plaintiff's past injury, the Supreme Court held that he lacked standing to pursue an injunction against the police department's use of chokeholds. To be able to seek prospective relief from future illegality, the plaintiff's standing "depended on whether he was likely to suffer future injury from the use of the chokeholds by police officers." *Id.* at 105. Although acknowledging the possibility that "there will be certain instances in which strangleholds will be illegally applied and injury ... unconstitutionally inflicted upon the victim," the Court thought it "no more than speculation to assert ... that Lyons himself will again be involved in one of those unfortunate instances." *Id.* at 108. Like the plaintiff in *Lyons*, Harbury lacks standing to seek an injunction against alleged future illegality because she "has made no showing that [s]he is realistically threatened by a repetition of [her] experience." *Id.* at 109. What is more, this rationale transcends her claim for declaratory judgment as well; for as this Circuit has concluded, the Supreme Court's holding in *Lyons* "would also have kept him from bringing suit for declaratory relief." *Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1273 (D.C. Cir. 1994); *accord Haase v. Sessions*, 835 F.2d 902, 911 (D.C. Cir. 1987); *see also Golden v. Zwickler*, 394 U.S. 103, 108-10 (1969). *City of Houston v. Department of Hous. & Urban Dev.*, 24 F.3d 1421, 1429 n.6 (D.C. Cir. 1994) ("[R]equests for declaratory relief which aim to prevent future illegal acts often will implicate standing concerns."). Accordingly, Harbury's claims for injunctive and declaratory relief shall be dismissed for lack of subject-matter jurisdiction.

III. *BIVENS* ACTIONS AGAINST OFFICIALS IN THEIR INDIVIDUAL CAPACITIES

A. *Brief Overview of Qualified Immunity*

While *Bivens* actions are intended to provide an avenue for vindicating constitutional rights, qualified immunity exists to ensure that the specter of monetary liability and harassing litigation will not unduly inhibit officials as they discharge their duties. *See Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Qualified immunity turns on the "objective legal reasonableness" of the action as assessed in light of the legal rules that were "clearly established" at the time the action was taken. *See id.* at 819.

In *Anderson v. Creighton*, 483 US. 635 (1987), the Supreme Court clarified the qualified-immunity standard. *Anderson* held that the right at issue must be particularized, not a general abstract claim to violation of "due process." Obviously, it is clearly established that government may not deprive someone of due process, but for qualified immunity to mean anything, the contours of the specific due-process right claimed must be defined in a more fixed, concrete fashion. In reviewing its qualified-immunity jurisprudence, the Supreme Court observed that

> Our cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously

> been held unlawful, but is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson, 482 U.S. at 640 (citations omitted). This standard governs Harbury's *Bivens* claims.

B. *Whether the alleged conspiracy to torture and execute Bamaca violates a clearly established right.*

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be ... deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. As framed by Harbury, the issue presented by Bamaca's torture and execution is: "whether the substantive due process protection afforded by the Fifth Amendment prohibits the government from engaging in the torture and murder of a foreign national on foreign soil." Pl.'s Opp'n at 11. Conceptualizing substantive due process as a general check on the federal government's power that transcends national borders, Harbury argues that the CIA defendants violated Bamaca's clearly established rights under the Fifth Amendment. Without eschewing the horror and grotesque treatment that Bamaca endured, the Court is bound by precedent to reject this constitutional claim.

Harbury suggests that the Fifth Amendment's promise of substantive due process acts as a general restraint on all actions that the federal government undertakes. Regardless of where or against whom the federal government acts, Harbury argues that the Fifth Amendment proscribes actions that shock the conscience. To support this claim, Harbury cites a number of cases that stand for the rather unremarkable, though fundamental, proposition that "substantive due process prevents the government from engaging in conduct that 'shocks that conscience.'" *United States v. Salerno*, 481 U.S. 739, 746

(1987) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952)); *see also Whitley v. Albers*, 475 U.S. 312, 327 (1986) ("[C]onduct that shocks the conscience or afford[s] brutality the cloak of law ... violates the [Due Process Clause]."); *Palko v. Connecticut*, 302 U.S. 319, 326 (noting that the Due Process clause could be construed to "give protection against torture"). From this premise, she leaps to conclude that the Due Process Clause's prohibition on conduct that shocks the conscience tempers every federal action.

Unlike other provisions in the Constitution, the Due Process Clause does not purport to establish a general prohibition on government conduct. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); *id.* art I. § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State."); *id.* art, I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law ...."); *id.*, art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States."). The Bill of Rights – and particularly the Fourth and Fifth Amendments – vest *individuals* with the rights that the government is constitutionally bound to respect. Thus the Fourth Amendment speaks in terms of "[t]he right of the people" and the Fifth Amendment offers its protections to a "person." They do not establish general limits on how government may act, but demarcate how government may act to certain *persons*. It comes as no surprise then to learn that this Circuit has held that "Fifth Amendment rights are, a fortiori, *personal* rights." *Bryson v. United States*, 419 F.2d 695, 699 (D.C. Cir. 1969) (emphasis added). A criminal defendant, for example, may not invoke the Fifth Amendment to exclude evidence obtained in violation of his co-conspirator's right against self-incrimination. This is not an issue of standing but a question of the substantive contours of the right. *See id.* Indeed, just this term, the Supreme Court reaffirmed that because the Fourth Amendment "protects persons against

unreasonable searches of 'their persons [and] houses,' the Fourth Amendment "is a *personal* right that must be invoked by an individual." *Minnesota v. Carter*, 119 S. Ct. 469, 473 (1998) (emphasis added). It also noted that because the right is uniquely personal, the "definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing." *Id.* at 472 (quoting *Rakas v. Illinois*, 439 U.S. 128, 140 (1978)).

Because the Fifth Amendment creates personal rights, to determine whether the government has violated those rights it is essential to identify which persons enjoy the Amendment's protections. At the outset, it is useful to recall that Bamaca was not a lawful permanent resident nor even an alien who had illegally entered the United States; rather, he was a foreign national located a hemisphere away. The distinction is crucial because while "[i]t is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment," *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953), the extent to which the Constitution extends extraterritorially boasts no such clarity. *Compare Mathews v. Diaz*, 429 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law.") with *Miller v. Albright*, 118 S. Ct. 1428, 1445 (1998) (Kennedy, J., concurring, O'Connor, J., joining) ("[I]t is unclear whether an alien may assert constitutional objections when he or she is outside the territory of the United States."). Careful examination of Supreme Court precedent militates against recognizing the constitutional right that Harbury advocates.

Nine years ago, the Supreme Court refused to extend the Fourth Amendment's protections beyond the shores of the

United States. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). Harbury asks this Court to brush *Verdugo-Urquidez* aside because it resolved only the extraterritorial application of the Fourth Amendment, not the Fifth Amendment. But Harbury adopts too parsimonious an interpretation of *Verdugo-Urquidez*. Though limited by the facts to the Fourth Amendment, the *Verdugo-Urquidez* opinion drew extensively from the Court's Fifth Amendment jurisprudence in marking off the metes and bounds of the Constitution's reach. Indeed, in reviewing its own precedents, the Supreme Court emphasized that "we have rejected the claims that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Verdugo-Urquidez*, 494 U.S. at 269.

After analyzing its prior holding in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court concluded that its "rejection of extraterritorial application of the Fifth Amendment was emphatic." *Verdugo-Urquidez*, 494 U.S. at 269. In *Johnson*, the Court found that enemy aliens arrested in China and imprisoned in Germany after World War II could not obtain writs of habeas corpus for alleged violations of the Fifth Amendment. *See Johnson*, 339 U.S. at 770. Of fundamental importance to this holding was a respect for the historical origins of the Fifth Amendment:

> Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view: None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it.

Id. at 784 (citation omitted). Moreover, five years before *Johnson*, and quoted with approval since then by the Court, Justice Murphy observed that "an alien obviously brings with him no constitutional rights .... The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores." *Bridges v. Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring); *accord Kwong Hai Chew*, 344 U.S. at 596 n.5; *Verdugo-Urquidez*, 494 U.S. at 271. And well before these cases, the Supreme Court held that "[n]either the constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect to our own citizens." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

Try as she might, Harbury offers nothing to undermine the doctrinal force of these cases. First, she relies on a passage from this Circuit's decision in *Cardenas v. Smith*, 733 F.2d 909, 915 (D.C. Cir. 1984), which posited that it is "beyond peradventure that a foreign nonresident, non-hostile alien may, under some circumstances, enjoy the benefits of certain constitutional limitations imposed on United States action." *Id.* From this ambiguous statement Harbury maintains that the rights of Bamaca were clearly established. Beyond its qualified rumination about the geographic scope of the Constitution, the *Cardenas* decision's most fundamental flaw is temporal: it precedes *Verdugo-Urquidez* by six years. As between *Cardenas*'s vague observation and *Verdugo-Urquidez*'s explicit understanding that the Supreme Court has "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States," *Verdugo-Urquidez*, 494 U.S. at 269, the court must abide by the latter.

None of this is to say that the Constitution is so parochial that its reach never extends beyond this country's borders. Yet when it stretches to foreign lands, it does so only to offer American citizens the protections from their government that

they would otherwise enjoy were they in the United States. *See, e.g., Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (recognizing that Fifth and Sixth Amendments extended to American civilians tried in military tribunals outside of the United States); *Curtiss-Wright*, 299 U.S. at 318 ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory *unless in respect of our own citizens.")* (emphasis added). Far from representing a broad expansion of the rights accorded to aliens located abroad, the *Reid* plurality merely held that "[w]hen the Government reaches out to punish a *citizen* who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." *Reid*, 354 U.S. at 6 (emphasis added). Although the respondent in *Verdugo-Urquidez* suggested that based on *Reid* "federal officials are constrained by the Fourth Amendment wherever and against whomever they act," the Supreme Court noted that "the holding of *Reid* stands for no such sweeping proposition." *Verdugo-Urquidez*, 494 U.S. at 270.

By way of analogy, neither *Reid* nor any other case supports the sweeping proposition that Harbury posits with respect to the Fifth Amendment. Among the other cases that Harbury marshals in her defense are "entry fiction" cases. *See Amanullah v. Nelson*, 811 F.2d 1, 9 (1st Cir. 1987); *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987). As one circuit has summarized it, the notion of the "entry fiction" provides that "although aliens seeking admission into the United States may physically be allowed within its borders pending a determination of admissibility, such aliens are legally considered to be detained at the border and hence as never having effected entry into this country." *Barrera-Echavarria v. Rison*, 44 F.3d. 1441, 1449 (9th Cir, 1995) (internal quotation omitted); *see also Shaughnessy v. Mezei*, 345 U.S. 206 (1953). Several circuits have concluded, not surprisingly, that notwithstanding the entry fiction, excludable aliens are entitled to be "free of gross

physical abuse at the hands of state and federal officials." *Lynch*, 810 F.2d at 1374. What animates these decisions, however, is not that the due-process clause operates universally but that, whatever merit there is to the entry fiction, "[i]t does not limit the right of excludable aliens detained *within United States territory* to humane treatment." *Id.* at 1373 (emphasis added). Thus, these courts are willing to pierce the entry fiction and extend the Due Process Clause to excludable aliens because they are, in fact, persons within the territory of the United States. Once the entry fiction is vitiated, case law clearly establishes that an alien "whose presence in this country is unlawful, involuntary, or transitory is entitled to [Fifth Amendment] constitutional protection." *Mathews v. Diaz*, 426 U.S. 67, 78 (1976). Because Bamaca, unlike the aliens at issue in *Lynch* and the other entry-fiction cases, was not remotely within the territory of the United States, Harbury's reliance on these cases is misplaced.

Finally, even if this Court were mistaken to hold that Bamaca enjoyed no protections under the Fifth Amendment, *Verdugo-Urquidez* and *Johnson* certainly underscore the tenuous and uncertain scope of that putative right. Indeed, as recently as last term, two Justices cited *Johnson* and *Verdugo-Urquidez* in concluding that "it is *unclear* whether an alien may assert constitutional objections when he or she is outside the territory of the United States." *Miller v. Albright*, 118 S. Ct. 1428, 1445 (1998) (Kennedy, J., concurring, O'Connor, J., joining) (emphasis added). Notably, unlike the *Cardenas* panel, Justices Kennedy and O'Connor did not indicate that it is unclear the *extent* to which the Constitution protects aliens abroad, but *whether* aliens may ever assert constitutional objections. *See Cardenas*, 733 F.2d at 917. Certainly where two Justices read *Johnson* and *Verdugo-Urquidez* to cast doubt on whether foreign nationals enjoy Fifth Amendment due-process rights, this Court cannot conclude that the right is "sufficiently clear that a reasonable official would understand that what he is doing

violates that right." *Anderson*, 483 U.S. at 640.[1] Accordingly, Harbury's *Bivens* claim for damages stemming from Barnaca's torture is dismissed for failure to state a claim upon which relief may be granted. *See* FED. R. CIV. P. 12 (b)(6).

B. Harbury's Right of Access to the Courts

Among the rights enshrined by the First and Fifth Amendments is the right of access to the courts. *See Turner v. Safley*, 482 U.S. 78, 84 (1987); *Wolff v. McDonnell*, 418 U.S. 529, 579 (1974); *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907). Reduced to its "most obvious and formal manifestation," the right of access "protects one's physical access" to the courts. *Crowder v. Sinyard*, 884 F.2d 804, 811 (5th Cir. 1989). Yet more than just a formalistic promise to be able to pass through the courthouse doors, the right guarantees access that will be "adequate, effective and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977). To that end, many circuits have held that conspiracies to destroy or cover-up evidence of a crime that render a plaintiff's judicial remedies inadequate or ineffective violates the right of access. *See, e.g., Delew v. Wagner*, 143 F.3d 1219, 1223 (9th Cir. 1998); *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262-64 (6th Cir 1997); *Foster v. City of Lake Jackson*, 28 F.3d 425, 429-31 (5th Cir.

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1 Recently, this Circuit tacitly acknowledged that aliens outside of the United States territory lack substantive rights under the Fifth Amendment:

> We likewise reject plaintiffs' claim that the State Department's consular venue policy violates the equal protection component of the Fifth Amendment's Due Process Clause. Plaintiffs concede that the migrants, as aliens, may not assert a Fifth Amendment right in challenging the procedures for granting immigrant visas. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990). The equal protection claim must be asserted, if at all, by the citizen sponsors of the migrants.

Legal Assistance for Vietnamese Asylum Seekers v. Department of State, 104 F.3d 1349, 1353-54 (D.C. Cir. 1997).

1994); *Williams v. City of Boston*, 84 F.2d 430 (1st Cir. 1986) (dicta); *Bell v. City of Milwaukee 746* F.2d 1205, 1261 (7th Cir. 1984). Harbury seeks damages under *Bivens* against the State Department and NSC Defendants because they allegedly "misle[d] [her] into believing that there was no information available as to her husband's circumstances and by falsely telling her that they would investigate and convey to her of [*sic*] any information they obtained." Pl.'s Opp'n at 27. Accepting as true Harbury's allegations and viewing them in the light most favorable to her, the court concludes that she has failed to state a claim based on a denial of access to the courts. Alternatively, the officials alleged to have violated Harbury's right would be entitled to qualified immunity.

Two principal episodes form the gravamen of Harbury's right-of-access claim. First, after Harbury discovered that the grave supposedly containing Bamaca's remains was not, in fact, that of her husband, she reported this revelation to Marilyn McAfee, the United States Ambassador to Guatemala at the time. *See* 2nd Am. Compl. ¶ 61. McAfee, in turn, indicated that she would investigate the matter immediately, report her findings to Harbury, and keep her properly informed about her husband's situation. *See id.* ¶ 62. According to Harbury, Ambassador McAfee and the other unnamed State Department Defendants mislead her, through allegedly deceptive statements and omissions, into believing that there did not exist any concrete information concerning her husband. *See id.* ¶¶ 67-68, 75.

During late November of 1994, the second instance of alleged deception occurred. After the State Department eventually released an official statement (prompted by a "60 Minutes" report that the U.S. Embassy in Guatemala had information about Bamaca) confirming that Bamaca was captured alive but purporting to know nothing more, Harbury met with National Security Advisor Anthony Lake. *See id.* ¶¶

81-83. NSA Lake apparently assured Harbury that the government had "scraped the bottom of the barrel" for information relating to Bamaca but would nonetheless continue to examine the situation and keep her informed. *See id.* ¶ 83. By the time that Harbury and NSA Lake met, however, the NSC possessed a September 1993 Defense Intelligence Agency report verifying that Bamaca has been executed while in custody. *See id.*¶ 84. Harbury claims that between her November 1994 meeting with NSA Lake and February 1995, she met repeatedly with State Department and NSC Defendants, who consistently informed her that no information existed to show that her husband was alive. *See id.* ¶ 86.

While this Court joins the other circuits that have recognized an access-to-courts claim based on a cover-up, it nonetheless must dismiss Harbury's action for two reasons. First, as this cause of action has evolved, courts have required the plaintiff to have already attempted to gain access to state-court remedies before bringing a constitutional denial-of access claim. *See Delew*, 143 F.3d at 1223; *Swekel*, 119 F.3d 1264; *Vasquez v. Hernandez*, 60 F.3d 325, 329 (7th Cir. 1995). Even the circuit that decided *Bell*, the case upon which Harbury states primary reliance, has clarified that because the "cornerstone of our decision in *Bell* was that conspiracy had prevented a full and open disclosure of facts crucial to the cause of action, rendering hollow the plaintiffs' right of access," no claim would arise unless the plaintiffs "have been prevented from pursuing a tort action in state court or that the value of such an action has been reduced by the cover-up." *Vasquez*, 60 F. 3d at 329. Cognizant that a violation of the right of access depends entirely on the extent to which a plaintiff's state court remedy has been undermined, the Sixth Circuit has concluded: "Before filing an 'access to courts' claim, a plaintiff *must make some attempt to gain access to the courts;* otherwise, how is this court to assess whether such access was in fact 'effective' and 'meaningful'?" *Swekel*, 119 F.3d at 1264 (emphasis added); *see also Delew*,

143 F.3d at 1223 ("[B]ecause the Delews' wrongful death action remains pending in state court, it is impossible to determine whether this [denial of right of access] has in fact occurred.") Harbury speculates that "it is likely that key witnesses ... may now be dead or missing, that crucial evidence may have been destroyed, and that memories may have faded." Pl.'s Opp'n at 31. That may all be true, but until Harbury "make[s] some attempt to gain access to courts ... how is this court to assess whether such access was in fact 'effective' and 'meaningful.'" *Swekel*, 119 F.3d at 1264.[2] A plaintiff attempting to bring an access-to-courts claim "cannot merely guess that a state court remedy will be ineffective because of a defendant's actions. Rather the plaintiff must present evidence that the defendant's actions *actually* rendered any available state court remedy ineffective." *Id.*; *accord Delews*, 143 F.3d at 1223; *see also Vasquez*, 60 F.3d at 329 (holding that no cause of action existed for an access-to-court claim despite an actual cover-up to destroy evidence because there was no allegation that the plaintiffs could not pursue a tort action in state court or that the value of that action had been reduced). Harbury's suspicion that the alleged cover-up may have prejudiced her rights to bring a separate action is nothing more than a guess.[3] For this reason, the cause of action would have to be dismissed.[4]

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2 To the extent that *Ryland v. Shapiro*, 708 F.2d 967, 973-75 (5th Cir. 1983), and *Bell* hold to the contrary, the Court declines to follow them. Moreover, more recent decisions from the Sixth, Seventh, and Ninth circuits that require a plaintiff to initiate a state-court action before bringing an access-to-court claim represents the better view.

3 That the statute of limitations may have run does not necessarily indicate that a state-court remedy is inadequate or ineffective. Where a defendant has fraudulently concealed its wrongdoing, the discovery rule or the doctrine of equitable tolling will permit a plaintiff to overcome a statute-of-limitations defense in most jurisdictions.

4 Harbury also claims that the Defendants' actins precluded her from bringing an action pursuant to the Freedom of Information Act, 5 U.S.C. §552. While the Defendants' alleged misrepresentations may have lulled her into complacency, the deceit did nothing to prevent her from actually filing a FOIA request. Indeed, Harbury did file a FOIA request in January 1995 amid the Defendants' persistent misrepresentations. She also claims that the Defendants' conduct prevented her from "seek[ing] judicial redress to save Mr. Bamaca's life." Pl.'s Opp'n at 31. What form this lawsuit would assume or whether she could maintain it is an issue that she never addresses. A cover-up to conceal evidence cannot prejudice a plaintiff's access to courts if the cause of action contemplated is untenable from the outset.

To dismiss on this ground would be to do so without prejudice in order to permit Harbury to re-file the action if, after prosecuting her state-court remedy, it becomes clear that the alleged cover-up did, in fact, prejudice her right of access to the courts.[5] Because the parties may well return to court some day, the Court feels compelled to examine whether the Defendants are entitled to interpose a qualified-immunity defense to Harbury's access-to-courts claim. After examining the allegations n the Complaint, the Court concludes that neither Ambassador McAfee nor NSC Lake would have reasonably understood that what he or she did violated a clearly established right of access.

In each of the cases where a plaintiff started an access-to-courts claim, the defendants had affirmatively destroyed evidence, manufactured false evidence, or intentionally refused to collect evidence. *See, e.g. Delew*, 143 F.3d at 1221 (police intentionally did not perform a blood-alcohol test on a suspected drunk driver and intentionally failed to preserve physical evidence of an accident such as skid marks); *Swekel*, 119 F.3d at 1260 (police intentionally refused to perform forensic tests and investigate); *Ryland*, 708 F.2d at 969 (prosecutor who had committed murder canceled a scheduled autopsy and obtained the fraudulent signature of the coroner certifying the cause of death as a suicide); *Bell*, 746 F.2d at 1215 (police officer who

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5 Of course, if the state-court action were dismissed on a independent ground divorced from the cover-up, *e.g.*, sovereign immunity or failure to state a claim upon which relief can be granted, no access-to-court claim would arise.

had shot and killed plaintiff's decedent planted a knife in the victim's hand, falsely claimed that the victim threatened him, and falsely claimed that he shot in self-defense). No such nefarious conduct is alleged in the Complaint. Ambassador McAfee and NSA Lake each assured Harbury that the government had no information about Bamaca and made allegedly disingenuous overtures to assist her. Similarly, the unnamed State Department and NSC Defendants perpetuated these misrepresentations by continuing to deny any knowledge about Bamaca. Conspicuously absent from the Second Amended Complaint are allegations that Ambassador McAfee, NSA Lake, or any other State Department or NSC Defendants destroyed evidence, manufactured evidence, or refused to satisfy a duty to investigate. To be sure, *Bell* colored the right with broad strokes, reasoning that the "constitutional right [of access to the courts] is lost where ... police officials shield from the public and the victim's family key facts which would form the basis of the family's claims for redress." *Bell*, 746 F.2d at 1261. But *Bell* and its progeny bear important factual differences from this case. Unlike the local crimes that the defendants in other cases covered-up, the State Department and NSC Defendants are alleged to have deceived Harbury about what they knew about the face of – in Harbury's words – "a high-ranking commander of the Guatemalan National Revolutionary Union ("U.R.N.G.") resistance forces." 2nd Am. Compl. ¶ 33, who had been captured during an armed conflict with military forces deployed by a government with whom the United States maintains formal relations. The court cannot hold that Ambassador McAfee, NSA Lake, or the unnamed State Depar[illegible]t and NSC Defendants would have reasonably known that they could not be forthcoming in discussing the intelligence that they received about Bamaca. This is not to say that the Defendants' action, if true, enjoy moral approbation nor is it to diminish the grief and anguish that Harbury must have endured in the months and years following her husband's capture. Liability under *Bivens*, however, depends not on collective outrage or moral

repugnancy but on clearly established constitutional norms that a reasonable official would understand. Ambassador McAfee, NSA Lake and the unnamed State Department and NSC Defendants are entitled, therefore, to qualified immunity from Harbury's access-to-courts claim.

D. *Constitutional Right of Familial Association*

Harbury alleges two methods in which the defendants violated her constitutional right of familial association. First, and most directly, her rights were supposedly violated when Bamaca was killed as a result of the alleged conspiracy. The second method itself has two facets, both based on State Departments/NSC misrepresentations about Bamaca's fate: one, that the lies severed a familial interest; two, that the lies impinged on her right to conduct her family affairs.

1. Whether Bamaca's death violated Harbury's right of familial association

Once again pressing into action the Seventh Circuit's decision in *Bell*, Harbury claims that the CIA Defendants violated her right to familial association under the First and Fifth Amendments when they allegedly conspired to murder Bamaca. *Bell*, several cases from the Ninth Circuit, and a footnote in a Third Circuit opinion – all of which concerned a parent's right to familial association with his or her child – suggest that parents possess an independent constitutional claim when government officials wrongfully end their children's lives. *See Bell*, 746 F.2d at 1244-45; *Kelson v. City of Springfield*, 767 F.2d 651, 653-55 (9th Cir. 1985), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327, 330-31 (1986), *Smith v. City of Fontana*, 818 F.2d 1411, 1418 & n.9 (9th Cir. 1987); *Estate of Bailey by Oare v. County of York*, 768 F.2d 503, 509 n.7 (3d Cir. 1985), *overruled on other grounds, DeShaney v.*

Winnebago County Dep't of Soc. Servs., 489 U.S. 198 (1989).[6] Other circuits, though recognizing that a right of familial association exists, have required evidence that the defendants' actions were aimed directly at the familial relationship; it is not enough in these jurisdictions that a familial relationship ended as an indirect result of unlawful government conduct. *See Shaw v. Stroud*, 13 F.3d 791, 804-05 (4th Cir. 1994); *Pittsley v. Warish*, 927 F.2d 3, 8 (1st Cir. 1991); *Harpole v. Arkansas Dep't of Hum. Servs,*, 820 F.2d 923, 927-28 (8th Cir. 1987); *Ortiz v. Burgos*, 807 F.2d 6, 7-9 (1st Cir. 1986); *Trujillo v. Board of County Comm'rs*, 68 F.2d 1186, 1189-90 (10th Cir. 1985); *Reed v. Knox County Dep't of Hum. Servs.*, 968 F. Supp. 1212, 1223-24 (S.D. Ohio 1997); *Divergilio v. Skiba*, 919 F. Supp. 265, 269 (E.D. Mich. 1996). After analyzing these competing conceptions of the right, the Court finds that the rule requiring that the defendants directly targeted the familial relationship best accords with Supreme Court precedent and the principles espoused in the First and Fifth Amendments. Moreover, even were this Court inclined to adopt the *Bell* reasoning, the Defendants would be entitled to qualified immunity under the standard.

Courts that have addressed this issue have divided constitutionally protected interests in familial relationships into two categories. In the first are those that preserve the right to

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6 Harbury cites *Mattis v. Schnarr*, 502 F.2d 588, 593-95 (8th Cir. 1974), for this proposition but the case offers no such support. Whether a father could maintain a § 1983 action against a police officer who shot and killed his son was not at issue before the Eighth Circuit. *See id.* at 590 & n.1 (noting that no appeal was taken from the district court's denial of the father's prayer for damages). Rather, the Court assessed whether a father's interest in familial association permitted him to raise a constitutional challenge for a declaratory judgment against a Missouri statute. Lest there be any doubt about the vitality or authority of *Mattis*, the Eighth Circuit's decision thirteen years later in *Harpole v. Arkansas Department of Human Services*, 820 F.2d 923, 297-28 (8th Cir. 1987), adopts a decidedly different conception of the right to familial association.

make private decisions affecting the family, such as procreation, *see Griswold v.Connecticut*, 381 U.S. 479 (1965), and whether to school one's children in religious as well as secular matters, *see Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Although Harbury raises claims based on this line of cases elsewhere in her Complaint, *see infra*, the present claim under review is not predicated on stripping her of the capacity to make decisions affecting the family. The second category of protected interests in familial relationships encompasses cases involving "governmental attempts to directly affect the parent-child relationship by means such as determining paternity or terminating parental rights." *Harpole*, 820 F.2d at 927; *accord Ortiz*, 807 F.2d at 8.

Although Harbury's relationship with her husband was forever severed as a result of the Defendants' alleged conspiracy, nothing in her Complaint or briefs suggests that the Defendants wanted Bamaca dead in order to interfere with the relationship that he and Harbury shared. As the First Circuit has noted, "we think it significant that the Supreme Court has protected the parent only when the government *directly* acts to sever or otherwise affect his or her legal relationship with a child." *Ortiz*, 807 F.2d at 8 (emphasis added). Other circuits have emphasized that the Due Process Clause does not "encompass deprivations resulting from government actions affecting the family only incidentally," *Shaw*, 13 F.3d at 805, that "in order to establish a violation of a right to familial associational privacy, the state action must be directly aimed at the parent-child relationship," *Pittsley*, 927 F.2d at 8, and that "[p]rotecting familial relationships does not necessarily entail compensating relatives who suffer a loss as a result of wrongful state conduct, especially when the loss is an indirect result of that conduct." *Harpole*, 820 F.2d at 928. Thus, even when government officials have savagely beaten a family member, many circuits have balked at recognizing an interference-with-familial-relations cause of action for lack of any allegations that

the defendants directly acted to sever the relationship. *See Shaw*, 13 F.3d at 804-05 (rejecting familial-association claim brought by wife and child of individual shot and killed by state trooper); *Harpole*, 820 F.2d at 927-28. Even the Seventh Circuit, which decided *Bell*, has admitted that *Bell* and its progeny "have, it is true, evoked a measure of skepticism in other circuits, especially now that the Supreme Court has held negligent infliction of harm is not actionable under section 1983." *Niehus v. Liberio*, 973 F.2d 526, 553 (7th Cir. 1992) (citing *Daniels v. Williams*,, 474 U.S. 327, 330-31 (1986)). Because Harbury does not claim that the Defendants directly targeted her relationship with Bamaca, she has failed to state a cause of action for interfering with her constitutional right of familial association.

Moreover, even were this Court inclined to follow the lead of *Bell*, the decisions from the First, Fourth, Eighth, and Tenth Circuits to the contrary undermine any claim that the right as conceptualized in *Bell* was clearly established. It is also significant that every case cited by Harbury and all familial-associational rights cases decided by the Supreme Court have concerned the parent-child relationship. These decisions have placed great emphasis on the unique nature of the relationship forged between a parent and his or her child. While the "clearly established" rubric does not mandate that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful," *Anderson* 483 U.S. at 640, the singularly special bond between parent and child sufficiently distinguishes *Bell* and its progeny from the case at bar. Accordingly, this cause of action is dismissed with prejudice.

2. Violation by Misrepresentation

a. Interference with attempts to obtain information about Bamaca

Harbury relies on this Court's opinion in *Franz v. United States*, 707 F.2d 582, 602 (D.C. Cir. 1983), in which the court held that the government unconstitutionally violated a non-custodial father's due process right when it placed the child in the Witness Protection Program without affording the father a hearing. From this case and one from the Eighth Circuit that reached the same result, *see Ruffalo by Ruffalo v. Civiletti*, 702 F.2d 710, 714 (8th Cir. 1983), Harbury attempts to claim that when the State Department and NSC Defendants lied to her about her husband's fate, they essentially acted like the *Franz* defendants by preventing her from gaining access to Bamaca. There is, however, an obvious difference between affirmatively removing a child from a parent's custody and simply deceiving (no matter how morally abhorrent) someone about the whereabouts of her husband.

Furthermore, Ambassador McAfee, NSA Lake, and the remaining State Department and NSC Defendants would not have reasonably understood their statements about Bamaca to run afoul of the constitutional right set forth in *Franz*. As this Court has already observed in a different context, Bamaca was apprehended during an armed conflict in Guatemala's tumultuous civil war. For the State Department and NSC Defendants to deny that they had any intelligence data concerning Bamaca does not violate any clearly established right under the Constitution. Qualified immunity therefore insulates the State Department and NSC Defendants from liability.

b. Interference with efforts to make family decisions

Harbury's final argument is equally imaginative and similarly vulnerable to a qualified immunity defense. Citing a number of Supreme Court cases that have affirmed the due-process right to be free from unreasonable governmental interferences with the family, Harbury claims that the State Department and NSC defendants violated this right when they lied to her about Bamaca's fate. Under this "right," Harbury "had the right to develop and select a course of action to protect her family members, just as she could have selected their medical care and educational efforts and religious activities. Concomitantly, if her husband was dead, she had a right to know the truth so as to be certain that he was no longer suffering, and to retrieve his remains, offer him proper burial and take any other appropriate actions." Pl.'s Opp'n at 39-40. Precedent, however, does not support the right that Harbury claims, and therefore, the Court concludes that she has failed to state a claim upon which relief may be granted. Moreover, whatever one may say about whether the Constitution's protections should encompass such claims, the right that Harbury prosecutes was by no means clearly established when the defendants allegedly lied to her.

This argument is exactly what the Supreme Court in *Anderson* cautioned against when it held that the rights asserted in *Bivens* actions must be particularized, not generalized claims under broad, somewhat amorphous constitutional provisions. Here Harbury cites a number of cases – none of which remotely touch upon the case at bar – that all share the common denominator that decisions "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy are central to the liberty" interest protected by the Due Process Clause. *See Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992). As the *Anderson* Court observed, "if the test of 'clearly established

law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow [v. Fitzgerald]*." *Anderson*, 483 U.S. at 639. From this general holding a reasonable official could not have anticipated incurring personal liability under *Bivens* for being less than forthcoming about what the federal government knew about Bamaca.

Moreover, case law seems at least indirectly to undermine Harbury's argument. In *Rust v. Sulllivan*, 500 U.S. 173 (1991), the Supreme Court upheld what became popularly known as the "gag rule." The gag rule was a regulation promulgated by the Department of Health and Human Services that, *inter alia*, prohibited clinics receiving Title X funds from counseling, referring, and advocating abortion as a method of family planning. The petitioners in *Rust* claimed that by "depriving a Title X client of information concerning abortion as a method of family planning, the [gag rule] violate[d] a woman's Fifth Amendment right to medical self-determination and to make informed medical decisions free of governmental-imposed harm." *Rust*, 500 U.S. at 202. The Court rejected the argument. Although not precisely on point, *Rust* does call into doubt the clarity of the informational right that Harbury claims. Because the right was not clearly established, the defendants should receive qualified immunity.

IV. Tort Liability of the Individual Defendants

The federal Defendants move to dismiss Harbury's tort claims for lack of subject-matter jurisdiction. Construing Harbury's Complaint to arise under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2679, the federal Defendants accurately observe that the only proper defendant in an FTCA action is the United States of America. Because Harbury has failed to sue the United States, her tort claims fail for want of jurisdiction – or so the argument goes.

What the federal Defendants fail to appreciate is that Harbury has not brought an action under the FTCA; she has, instead, simply sued each of the defendants in his or her individual capacities for various common-law torts. *See* 2d. Am. Compl. ¶¶ 10-32 (indicating that defendants are sued in their official *and* individual capacities). To be sure, her claims may very well come to be adjudicated under the aegis of the FTCA if the Attorney General certifies that the defendants were "acting within the scope of [their] office or employment at the time of the incident out of which the claim arise." 28 U.S.C. § 2679(d)(1). But the Attorney General has yet to certify that any of the named defendants were acting within the scope of their employment. If she were to issue such certifications, the United States will automatically be substituted for the individual defendants. *See id.* Thus, Harbury need not amend her Complaint to add the United States as a party-defendant if, in fact, the Attorney General subsequently certifies that the named defendants were acting within the scope of their offices or employment. Accordingly, the Defendants' motion to dismiss Harbury's tort claims is denied with respect to the individuals named in the Second Amended Complaint.[7]

---

7 To the extent Harbury seeks to sue the CIA, the State Department, and the NSC for tort violations this Court lacks subject-matter jurisdiction because none of those agencies has waived sovereign immunity from suit except on the terms set forth in the FTCA. As noted above, the only proper party under the FTCA is the United States.

V. CONCLUSION

For the foregoing reasons, the Court grants in part and denies in part the federal Defendants' motion to dismiss. A separate Order accompanies this Memorandum Opinion.[8]

March 22, 1999

/s/ Colleen Kollar-Kotelly
COLLEEN KOLLAR-KOTELLY
United States District Judge

---

8 Harbury's Second Amended Complaint contains a single count for violations of international law. All that the Defendants say about this claim is that it is vague because she cites no applicable provisions of international law. Although it is vague, to e sure, the Court refuses to dismiss it on that basis alone. Pursuant to the accompanying Order, Harbury shall file a more definite statement indicating the specific provisions and norms of international law that the Defendants allegedly violated.

APPENDIX C

Jennifer K. HARBURY, Plaintiff,
v.
John M. DEUTCH, et al., Defendants.

No. 96-00438 (CKK).

United States District Court,
for the District of Columbia.

ORDER

For the reasons expressed in the accompanying Memorandum Opinion, it is, this 22 day of March, 1999, hereby

ORDERED the Defendants' motion to dismiss [#78] shall be, and hereby is, **GRANTED IN PART** and **DENIED IN PART**; and it is

FURTHER ORDERED that Counts 1-17 of the Seconded Amended Complaint shall be, and hereby are, **DISMISSED WITH PREJUDICE**; and it is

FURTHER ORDERED that in all other respects, the Defendants' motion to dismiss is **DENIED**; and it is

FURTHER ORDERED that by no later than April 5, 1999, the Plaintiff shall file a more definite statement identifying the specific norms and provisions of international law on which she

predicates the international-law claim in her Second Amended Complaint.

SO ORDERED.

/s/ Colleen Kollar-Kotelly
COLLEEN KOLLAR-KOTELLY
United States District Judge

APPENDIX D

Jennifer K. HARBURY, Plaintiff,
v.
John M. DEUTCH, et al., Defendants.

No. 96-00438 (CKK).

United States District Court,
for the District of Columbia.

ORDER AND JUDGMENT

Upon consideration of Defendant's motion for Rule 54(b) certification and the entire record, and it

Appearing that this Court's opinion and order filed March 23, 1999 resolves some but not all of the claims against some but not all of the parties, and it further

Appearing that especially in view of the Supreme Court's admonition in Harlow v. Fitzgerald, 457 U.S. 800 (1982) that suits brought under Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) against federal officials in their personal capacities should be resolved promptly, and it further

Appearing that this Court hereby expressly determines that there is no just cause for delay, it is therefore this 8 day of August, 1999, hereby

ORDERED that final judgment is hereby entered in favor of the individual defendants on the Bivens claims against them.

/s/ Colleen Kollar-Kotelly
United States District Judge

APPENDIX E

Jennifer K. HARBURY, on her own behalf and as administratrix of the Estate of Efrain Bamaca-Velasquez Appellant,
v.
John M. DEUTCH, Director, Central Intelligence Agency (CIA), et al., Appellees.

No. 99-5307.

United States Court of Appeals,
District of Columbia Circuit.

Filed April 6, 2001.

Before: HARRY T. EDWARDS, Chief Judge, GINSBURG and TATEL, Circuit Judges.

ORDER

PER CURIAM:

Upon consideration of appellees' petition for rehearing filed January 26, 2001, it is

ORDERED that the petition be denied.

The Government claims that the panel opinion "marks a significant and potentially dangerous expansion of the constitutional 'right of access' to the courts," creating an "open-ended constitutional tort for every instance where a government official conceals information, or obstructs a judicial proceeding." Appellees' Petition for Reh'g at 1, 7. This is incorrect. To begin with, as a procedural matter, the opinion will not open the courts to a flood of constitutional access to

courts claims. It endorses the general requirement that prior to bringing a claim for deprivation of access to courts based on an alleged cover-up, plaintiff must first press her underlying claims to ensure that the alleged cover-up in fact prejudiced her ability to seek relief. *See Harbury v. Deutch*, 233 F.3d 596, 608-09 (D.C. Cir. 2000). The panel opinion permits Harbury to bring her access to courts claim now only because, if the facts she pleads are correct (this case is here on a motion to dismiss), defendants' actions "completely foreclosed" one of her primary avenues of relief. *Id* at 609. Moreover, as a substantive matter, the opinion distinguishes Harbury's situation from those where a plaintiff, despite a cover-up, has enough information to file a "John Doe" suit. *Id.* at 609-10. It thus expresses no view on the constitutionality of cover-ups that do not "conceal[ ] most of the essential facts" of a cause of action until bringing it would be "futile." *Id.* (internal quotation marks omitted). In addition, and most important, the opinion explicitly and repeatedly limits its holding to situations where--as Harbury alleges – defendants both affirmatively mislead plaintiffs *and* do so for the very purpose of protecting government officials from suit. *See id.* at 608, 610, 611.

The Government also alleges that cover-ups of the type alleged here are sometimes "necessary in order to protect the national security or to maintain the secrecy of classified intelligence sources or methods." Appellees' Petition for Reh'g at 2. Accordingly, the Government argues, the panel opinion threatens to "jeopardize foreign intelligence sources and implicate foreign relations." *Id.* As the opinion expressly points out, however, the Government never claimed, either before the district court or the panel, that the cover-up alleged by Harbury was necessary to maintain national security. *See Harbury*, 233 F.3d at 610. Having not yet filed an answer in this case, the Government is free to assert a national security defense when it does so.

Next, the Government claims that Harbury has failed to "point to a colorable claim that has been prejudiced by the alleged cover-up" and that "the injunctive action which was allegedly thwarted is not even colorable." Appellees' Petition for Reh'g at 9, 14. But Harbury specifically claimed in her complaint that the alleged cover-up "foreclosed [her] from effectively seeking adequate legal redress." *See* Complaint ¶ 98, cited in *Harbury*, 233 F.3d at 609. Such a "short and plain statement of the claim," Fed.R.Civ.P. 8(a)(2), providing sufficient information to allow a party to "frame a responsive pleading," Fed.R.Civ.P. 12(e), is all the federal rules require. *See Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1085-86 (D.C. Cir. 1998). Moreover, on appeal – and without response from the Government – Harbury amplified this claim, explaining in her brief that if she had "learned of her husband's situation while he was still alive, she would have immediately initiated court proceeding[s] seeking emergency injunctive relief." Appellant's Opening Brief at 35. At oral argument, her counsel further explained that such an injunction could have been based on an underlying claim for intentional infliction of emotional distress. *Harbury*, 233 F.3d at 609. On a motion to dismiss, "the factual allegations of the complaint must be taken as true, and *any* ambiguities or doubts concerning the sufficiency of the claim must be resolved in favor of the pleader." *Doe v. United States Dept. of Justice*, 753 F.2d 1092, 1102 (D.C. Cir. 1985). Here, Harbury's proposed action for injunctive relief to save her husband's life is on its face colorable. *See Harbury v. Deutch*, No. 96- 00438 at 27-28 (D.D.C. Mar. 23, 1999) (denying the Government's motion to dismiss Harbury's tort claims). On remand, it is certainly open to the Government to argue – if the record as it is developed so allows – that Harbury's hypothetical injunctive action would have been so unlikely to succeed that she cannot plausibly claim that defendants' alleged cover-up was a "substantial cause of [her] failure to obtain judicial relief." *Bell v. City of Milwaukee*, 746 F.2d 1205, 1263 n. 72 (7th Cir. 1984).

Our dissenting colleagues suggest that "[n]o United States court could reach the alleged tortfeasors, Guatemalan nationals on Guatemalan soil, in order to prevent their killing Harbury's husband, another Guatemalan national." *Harbury v. Deutch*, No. 99-5307, slip op. dissent at 1 (Henderson, J., dissenting from denial of rehearing en banc). But as the intentional infliction of emotional distress claims Harbury also pleaded in her complaint demonstrate, *see Harbury*, 233 F.3d at 600, the alleged tortfeasors here were domestic: the government officials who allegedly conspired with, collaborated with, directed, and paid Bamaca's torturers. *See* Complaint at ¶ 200 ("The CIA Defendants' collaborating and/or conspiring with and/or directing Julio Roberto Alpirez and/or others who intentionally and secretly imprisoned, tortured and extrajudicially executed Mr. Bamaca constituted extreme and outrageous conduct."). Harbury's complaint also suggests that in her action for intentional infliction of emotional distress, she could have alleged injury not just to Bamaca, but also to herself; in other words, Harbury, a United States citizen, could have sought relief in a United States court on her own behalf against United States government officials. *See* Complaint at ¶ 201 ("This extreme and outrageous conduct was engaged in intentionally or recklessly and caused both Mr. Bamaca and Plaintiff to endure severe physical and emotional distress."). As Harbury explains in her response to the Government's petition, an injunctive action against these officials might have saved Bamaca's life by enjoining them from "directing, conspiring in, and paying for the continued secret detention and torture of her husband, and direct[ing] [them] to require the assets on the payroll to stop engaging in such behavior." Appellant's Response to Petition for Reh'g at 9. As we stated earlier, the Government is free to argue on remand that, either because of the nature (or absence) of the relationship between Bamaca's torturers and the CIA defendants, or for some other reason, the chances of this happening were too remote to justify awarding Harbury relief.

The Government next suggests that it is unclear "what legal liability the State Department and NSC officials were attempting to avoid," since "[Harbury's] state law tort claims regarding the torture of her husband are all directed at the CIA defendants." Appellees' Petition for Reh'g at 11. But access to courts claims are not restricted to cases in which officials are alleged to have covered up their own illegal actions, and the Government itself acknowledges that two of the cases it cites, *Bell*, 746 F.2d at 1256-58, and *Ryland v. Shapiro*, 708 F.2d 967, 969 (5th Cir. 1983), involve cover- ups of "coworkers' wrongdoing." *See* Appellees' Petition at 7. Here, Harbury alleges that all three defendant agencies worked together to conceal Bamaca's capture and torture in order to obtain the maximum amount of information from him. *See* Complaint at ¶ 167 ("[State and NSC defendants] have a long-standing policy, pattern or practice of providing false information, through fraudulent statements and intentional omissions, as to the fate of anyone injured or killed through the CIA's long-standing policy, pattern or practices related to the extraction of information."); *id.* at ¶ 67, *quoted in Harbury*, 233 F.3d at 600 ("[State and NSC defendants] intentionally misled [Harbury] . . . because they did not want to threaten their ability to obtain information from Mr. Bamaca."). Moreover, after their initial cover-up of Bamaca's capture, State and NSC defendants themselves might have been subject to direct tort liability for their alleged concealment and misrepresentation. *See* Complaint at ¶¶ 217-37 (stating tort claims against these defendants for intentional infliction of emotional distress, intentional misrepresentation, negligent misrepresentation, and constructive fraud). In allegedly deceiving Harbury, they thus might have been attempting to avoid their own legal liability as well.

As to Harbury's allegations of defendants' intent, although the Government is correct that under *Crawford-El v.*

Britton, 523 U.S. 574, 598, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998), a district court can require a plaintiff to support her complaint with "specific, nonconclusory factual allegations," Appellees' Petition for Reh'g at 11, the district court here did this only with respect to Harbury's conspiracy allegations against the CIA defendants – not with respect to Harbury's access to courts claim. *Harbury v. Deutch*, No. 96-00438 at 5 (D.D.C. July 20, 1998) (order requiring plaintiff to "put forward specific, nonconclusory factual allegations that establish improper motive" of CIA defendants). Moreover, Harbury expressly alleged that "internal [State and NSC] memoranda" reveal the defendants' intent to mislead Harbury. *Harbury*, 233 F.3d at 600.

Finally, with respect to the Government's qualified immunity arguments, neither the fact that defendants did not "fabricat[e] evidence," Appellees' Petition for Reh'g at 14, nor the fact that the alleged torture occurred outside the United States is enough to entitle the defendants to qualified immunity. Under *Anderson v. Creighton*, the "very action in question" need not have been previously held unlawful; rather, the law need only allow officials "'reasonably [to] anticipate when their conduct may give rise to liability for damages.'" 483 U.S. 635, 639-40, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (quoting *Davis v. Scherer*, 468 U.S. 183, 195, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984)). Here, defendants allegedly acted affirmatively to mislead Harbury and did so with a specific intent to deny her access to a federal court. Under existing caselaw, such action was clearly unconstitutional. *See Dele v. Wagner*, 143 F.3d 1219, 1222 (9th Cir. 1998) (following the Sixth Circuit and stating that "the Constitution guarantees plaintiffs the right of meaningful access to the courts, the denial of which is established where a party engages in pre-filing actions which effectively cover[ ]-up evidence and actually render[ ] any state court remedies ineffective"); *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir. 1997) ("if a party engages in actions

that effectively cover-up evidence ... they have violated his right of access to the courts"); *Vasquez v. Hernandez*, 60 F.3d 325, 328 (7th Cir. 1995) ("[E]fforts by state actors to impede an individual's access to courts . . . may provide the basis for a constitutional claim under 42 U.S.C. § 1983."); *Crowder v. Sinyard*, 884 F.2d 804, 812 (5th Cir. 1989) ("[I]f state officials wrongfully and intentionally conceal information crucial to a person's ability to obtain redress through the courts, and do so for the purpose of frustrating that right, and that concealment and the delay engendered by it substantially reduce the likelihood of one's obtaining the relief to which one is otherwise entitled, they may have committed a constitutional violation."); *Ryland*, 708 F.2d at 973 (constitutional right of access violated where "agents of the state intentionally engaged in conduct that interfered with [the] exercise of [the] constitutionally protected right to institute a wrongful death suit"); *cf. Barrett v. United States*, 798 F.2d 565, 575 (2d Cir. 1986) ("[G]overnment officials," though "not under any duty to volunteer to [plaintiff] information that would alert it to the existence of a claim against the federal government and certain of its officials for . . . wrongful death," "[o]n the other hand . . . were not free to arbitrarily interfere with [plaintiff's] vindication of its claims. Unconstitutional deprivation of a cause of action occurs when government officials thwart vindication of a claim by violating basic principles that enable civil claimants to assert their rights effectively.").

In arguing that defendants are entitled to qualified immunity, our dissenting colleagues again rely on the notion that the tortfeasors here are foreign nationals: they suggest that reasonable officials could have thought it constitutional to cover up Bamaca's "captivity by foreign nationals on foreign soil in order to keep [Harbury] from obtaining relief in a United States court that would prevent her husband's subsequent murder on foreign soil at the hands of the foreign nationals." *Harbury*, No. 99-5307, slip op. dissent at 2. But again, Harbury does not

allege that defendants violated her right of access to courts by covering up the actions of foreign nationals unassociated with the United States government. Rather, she alleges that defendants are liable for misleading her about the involvement of United States government officials who allegedly "engaged in, directed, collaborated and conspired in, and otherwise contributed to" Bamaca's torture and murder. *See* Complaint at ¶ 49, *quoted in Harbury*, 233 F.3d at 599. Similarly, the legal liability defendants allegedly intended to avoid was not the liability of Guatemalan nationals unassociated with the United States government, but rather the liability of fellow United States Government officials for their involvement in Bamaca's torture.

APPENDIX F

Jennifer K. HARBURY, on her own behalf and as administratrix of the Estate of Efrain Bamaca-Velasquez, Appellant,

v.

John M. DEUTCH, Director, Central Intelligence Agency (CIA), et al., Appellees.

No. 99-5307.

United States Court of Appeals,
District of Columbia Circuit.

Filed April 6, 2001.

Before: EDWARDS, Chief Judge; STEPHEN F. WILLIAMS, GINSBURG, SENTELLE, KAREN LeCRAFT HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, Circuit Judges.

A statement of Circuit Judge HENDERSON dissenting from the denial of rehearing en banc, joined by Circuit Judge SENTELLE, is attached.

Circuit Judge GARLAND did not participate in this matter.

ORDER

PER CURIAM:

Appellees' petition for rehearing en banc and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

KAREN LeCRAFT HENDERSON, Circuit Judge, with whom SENTELLE, Circuit Judge, joins, dissenting:

I dissent from the denial of rehearing en banc because Harbury suffered no constitutional deprivation or, alternatively, if she did, the individual defendants are entitled to qualified immunity from liability therefor. As the panel opinion notes, to state a claim Harbury must allege that the defendants' misrepresentations and nondisclosures foreclosed her "'from effectively seeking adequate legal redress,'" *Harbury v. Deutch*, 233 F.3d 596, 609 (D.C. Cir. 2000) (quoting Complaint ¶ 98). Yet Harbury has nowhere identified what "legal redress" might have been adequate to save her husband. Her claim on appeal that but for the government's deception she "could have sought an emergency injunction based on an underlying tort claim for intentional infliction of emotional distress," *id.*, does not fill the bill. No United States court could reach the alleged tortfeasors, Guatemalan nationals on Guatemalan soil, in order to prevent their killing Harbury's husband, another Guatemalan national. While Harbury may not be required to plead "a strict causal showing of exactly what relief [she] would have obtained in court had defendants not concealed the truth," she must nevertheless "establish that the concealment was a substantial cause of [her] failure to obtain judicial relief." *Bell v. City of Milwaukee*, 746 F.2d 1205, 1263 n. 72 (7th Cir. 1984). She has not. The only cause is the absence of any effective relief. "I do not believe the Court does a [party] a favor by giving it an opportunity to expend resources in litigation that has no chance of success." *South Carolina v. Regan*, 465 U.S. 367, 403, 104 S.Ct. 1107, 79 L.Ed.2d 372 (1984) (Stevens, J., dissenting).

Even had Harbury made a colorable claim, the individual government defendants would be entitled to qualified immunity because reasonable officials in their positions could have

believed that under established law their actions did not violate Harbury's constitutional right of access to the courts. In cases from other circuits finding such a right was violated, the plaintiffs alleged that the defendant state officials, police officers or prosecutors, covered up murders by other such officials in order to prevent the plaintiffs from pursuing wrongful death actions. *See, e.g., Bell, supra*; *Ryland v. Shapiro*, 708 F.2d 967, 972 (5th Cir. 1983). In this case, by contrast, Harbury contends the National Security Council and the State Department covered up her husband's captivity by foreign nationals on foreign soil in order to keep her from obtaining relief in a United States court that would prevent her husband's subsequent murder on foreign soil at the hands of the foreign nationals. The defendants plainly were not on notice that such very different conduct might violate Harbury's right of access to the courts. *See Butera v. District of Columbia*, 235 F.3d 637, 646 (D.C. Cir. 2001) ("A constitutional right was 'clearly established' at the time of the events in question only if '[t]he contours of the right [were] sufficiently clear that a reasonable officer would understand that what he [was] doing violate[d] that right.'") (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)) (citing *Harris v. District of Columbia*, 932 F.2d 10, 13 (D.C. Cir. 1991); *Martin v. Malhoyt*, 830 F.2d 237, 253 (D.C. Cir. 1987)).

APPENDIX G

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

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479-3011

June 28, 2001

Hon. Theodore R. Olson
Solicitor General
Department of Justice
Washington, DC 20530

Re: John M. Deutch, et al. v. Jennifer K. Harbury
Application No. 00A1139

Dear Mr. Olson:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on June 28, 2001, extended the time to and including August 6, 2001.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, CLERK

By /s/ Melissa A. Blalock

Melissa A. Blalock
Assistant Clerk

APPENDIX H

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

June 28, 2001

Hon. Theodore R. Olson
Solicitor General
Department of Justice
Washington, DC 20530

Re: John M. Deutch, et al. v. Jennifer K. Harbury
Application No. 00A1139

Dear Mr. Olson:

The application for a further extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on July 31, 2001, extended the time to and including September 3, 2001.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, CLERK

By /s/ Melissa A. Blalock

Melissa A. Blalock
Assistant Clerk

Supreme Court, U.S.
FILED
NOV 5 2001
OFFICE OF THE CLERK

No. 01-394

IN THE

Supreme Court of the United States

WARREN CHRISTOPHER, *et al.*,
Petitioners,

v.

JENNIFER K. HARBURY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should grant review of the decision of the D.C. Circuit where the decision below does not conflict with any decision of any other court of appeals or this Court?

2. Whether review is warranted where the decision of the court below represents a straightforward application of well-settled law?

3. Whether this Court should grant review given that no issue of national importance is implicated?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 11

I. THE COURT OF APPEALS' ANALYSIS OF THE UNDERLYING CONSTITUTIONAL CLAIM IS COMPLETELY CONSISTENT WITH THIS COURT'S PRECEDENTS. 11

II. THERE IS NO CIRCUIT SPLIT ON ANY QUESTION PRESENTED IN THIS PETITION 14

III. THE COURT OF APPEALS' QUALIFIED IMMUNITY ANALYSIS WAS CONSISTENT WITH SETTLED CASE LAW. 19

IV. NO OTHER COMPELLING REASON EXISTS TO GRANT CERTIORARI IN THIS CASE 22

V. REVIEW WOULD BE PREMATURE 25

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Barrett v. United States, 798 F.2d 565 (2d Cir. 1986) 11, 22

Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984) ..... *passim*

Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) 3

Bounds v. Smith, 430 U.S. 817 (1977) 12, 13

Chambers v. Baltimore & Ohio Railroad Co., 207 U.S. 142 (1907) 13, 24

Delew v. Wagner, 143 F.3d 1219 (9th Cir. 1998) 11, 15, 16

Foster v. City of Lake Jackson, 28 F.3d 425 (5th Cir. 1994) 19, 21

Frugone v. CIA,169F.3d 772 (D.C. Cir. 1999) 23

Hudson v. Palmer, 468 U.S. 517 (1984) 14

Lewis v. Casey, 518 U.S. 343 (1996) 12

Lujan v. G&G Fire Sprinklers, Inc., 121 S. Ct. 1446 (2001) 14

Parratt v. Taylor, 451 U.S. 527 (1981), *overruled by, Daniels v. Williams*, 474 U.S. 327 (1986) 14

Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983) 11, 18, 22

Swekel v. City of River Rouge, 119 F.3d 1259 (6th Cir. 1997) 11, 15, 16, 19

TABLE OF AUTHORITIES - continued

Vasquez v. Hernandez, 60 F.3d 325 (7th Cir. 1995) 11, 13, 17, 18

Virginia Military Institute v. United States, 508 U.S. 946 (1993) 25

Wilson v. Layne, 526 U.S. 603 (1999) 20

RULES

Sup. Ct. R. 10 1

No. 01-394

IN THE

Supreme Court of the United States

WARREN CHRISTOPHER, et al.,

Petitioners

v.

JENNIFER K. HARBURY,

Respondent.

BRIEF IN OPPOSITION

INTRODUCTION

Respondent Jennifer K. Harbury respectfully submits this brief in opposition to the Petition for a Writ of Certiorari filed by the individual petitioners.

There is no compelling reason to review the decision below. Sup. Ct. R. 10. First, the decision of the court below is utterly unremarkable. That court merely held, consistent with every other court to consider the issue – including the Second, Fifth, Sixth, Seventh and Ninth Circuits – that the constitutional right of access to courts is violated when a government official deliberately engages in a cover-up for the very purpose of preventing a litigant from filing suit. Petitioners point to no decision of this Court or of any lower court that is in tension with that holding.

Nor is there a circuit split on any question presented by this case. Although petitioners attempt to manufacture a split by claiming that the D.C. Circuit eliminated an "exhaustion" requirement, that is a plain misrepresentation of the court's opinion. Indeed, the court itself expressly endorsed the general exhaustion requirement, Pet. App. 23a-24a, and held only – consistent with the very cases on which petitioners purport to rely – that exhaustion is not necessary in the narrow category of cases in which resort to state court would necessarily be futile. Petitioners' second purported split fares no better. No court has ever concluded that something more than a deliberate deception designed to deny a plaintiff her constitutional right to access the courts is needed to state a claim and, indeed, the cases on which petitioners themselves rely involve just such conduct.

The D.C. Circuit's analysis of qualified immunity was also consistent with this Court's precedent. The D.C. Circuit, as it was required to do, found that at the time of the events in question there was a clear consensus of cases of persuasive authority holding that a government official may not abridge the right of access to the courts by engaging in a deliberate cover-up. Although petitioners rehash their "exhaustion" argument in an attempt to demonstrate that the law is unsettled, their argument is wrong. The law is clear. In any event, whether state court review is required as a prerequisite to bringing an access to courts claim is not relevant to the qualified immunity analysis, which concerns only the lawfulness of the underlying government official *conduct* – not the procedural requirements imposed on a plaintiff challenging such conduct.

There is no other compelling reason to grant review in this case. Although the petitioners suggest that the D.C. Circuit's

holding would impede U.S. foreign policy and intelligence efforts, their concern is not shared by the Solicitor General, who declined to file a brief in support of the petitioners at this stage of the proceedings. In any event, the decision below will have no adverse impact at all. As the D.C. Circuit made clear, the holding below is limited to a narrow subset of cases in which government officials not only refuse to answer questions but in fact affirmatively deceive citizens – and do so for the very purpose of preventing the filing of a lawsuit.

Finally, review in this case would be premature. The District Court still has pending before it a number of common law tort claims arising out of the same set of facts and circumstances on which jurisdictional discovery is currently proceeding. Moreover, as the petitioners have yet to answer the complaint, they have not yet asserted any defenses, such as national security, that may be available to them.

STATEMENT OF THE CASE

Jennifer Harbury brought this lawsuit in 1996 against the State Department, the National Security Council, and the Central Intelligence Agency, as well as several named and unnamed officials of those agencies. Ms. Harbury brought this lawsuit on her own behalf and as administratix of the estate of her late husband, Efrain Bamaca-Velasquez. In the lawsuit, Ms. Harbury alleged a series of constitutional torts pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Ms. Harbury also alleged a number of common law torts against the defendants.

Because this case comes to the Court on a motion to dismiss, the allegations in Ms. Harbury's complaint are taken to be true. Ms. Harbury, an American citizen, married Mr.

Bamaca, a Mayan citizen of Guatemala, in 1991. On or about March 12, 1992, he disappeared in the southwestern region of his homeland. The Guatemalan Army reported at the time that Mr. Bamaca had committed suicide during a skirmish between government and rebel troops and had been buried nearby. *Harbury v. Deutch*, Pet. App. 2a-3a. In fact, Mr. Bamaca had been captured alive and secretly detained by members of the Guatemalan military. *Id.* at 3a. Within a week of his capture, the CIA informed both State Department and NSC officials that the Guatemalan military would likely fabricate his combat death in order to maximize its ability to obtain information from him. *Id.* at 6a.

In early 1993, Ms. Harbury learned from an eyewitness that her husband was in fact alive, but that he was being secretly detained and tortured by the Guatemalan military. *Id.* at 3a. Ms. Harbury immediately contacted State Department officials, including several of the petitioners, provided these officials with the information she had learned, and asked them to provide her with information about Mr. Bamaca's status. *Id.* These officials promised to look into the matter and to assist her. *Id.* Although they were already aware of the earlier CIA report indicating that Mr. Bamaca was still alive, they told her that they had no information. *Id.* at 6a.

In August 1993, Ms. Harbury was granted permission to open the grave which purportedly held Mr. Bamaca's remains. However, just as the eyewitness had reported to her, the body in the grave was not that of her husband. *Id.* at 3a. Ms. Harbury immediately informed petitioner Marilyn McAfee, the U.S. Ambassador to Guatemala, who promised to investigate the matter and to report back her findings. *Id.* Ms. McAfee, like the other State Department petitioners, also was aware of the CIA report concerning Mr. Bamaca. *Id.* at 6a. However,

she too told Ms. Harbury that she knew nothing of his fate. *Id.*

From October 1993 to October 1994, Ms. Harbury continued to meet with various State Department officials, including additional petitioners. *Id.* at 3a. By then the petitioners had received additional reports about Mr. Bamaca, including reports of his extra-judicial execution. *Id.* at 6a. However, they still informed Ms. Harbury that they had no information, repeated their concern, and promised to look into the matter further. *Id.* at 3a-4a.

In October of 1994, the CBS news program "60 Minutes" reported that the U.S. Embassy in Guatemala in fact possessed an intelligence report confirming that Mr. Bamaca had been captured alive. *Id.* at 4a. As a result, the State Department publically confirmed the CBS report, but insisted that it did not know whether Mr. Bamaca remained alive. *Id.* Ms. Harbury then met with petitioner Anthony Lake, the National Security Advisor, who told her that the Government had "scraped the bottom of the barrel" for information about her husband and that no further information existed. Mr. Lake promised he would keep Ms. Harbury informed if he learned of further information, as did other State Department and NSC officials with whom Ms. Harbury met. None of these officials provided her with any other information. *Id.* Suspecting that the government officials with whom she had met were not being truthful, Ms. Harbury then filed a Freedom of Information Act request. *Id.* No documents were initially provided to her. *Id.*

In March 1995, Congressman Robert Torricelli publically announced that Mr. Bamaca had been killed on the orders of a paid CIA asset. *Id.* at 4a-5a. Ms. Harbury later learned, through documents provided to her in response to her FOIA request, that prior to his death Mr. Bamaca had been captured

and secretly detained by members of the Guatemalan security forces who were also acting as paid CIA assets. *Id.* at 5a. For approximately 18 months, Ms. Harbury learned, Mr. Bamaca had been tortured by those security forces in order to obtain information about the Guatemalan resistance for the benefit of the CIA. *Id.* at 3a. Ms. Harbury further learned that State Department and NSC officials, including the petitioners, had known from the very outset that Mr. Bamaca was alive and being tortured. *Id.* at 5a-6a.

Ms. Harbury then brought this lawsuit against the petitioners, raising several categories of claims. First, Ms. Harbury claimed that the CIA defendants violated her husband's Fifth Amendment substantive due process rights by conspiring to bring about his imprisonment, torture and execution. Second, Ms. Harbury claimed that the petitioners violated her constitutional right of access to the courts by deliberately misleading her into thinking that no information existed about the fate of Mr. Bamaca, thereby preventing her from taking the legal action necessary in order to save his life. Had the petitioners not deceived her by telling her that they had sought information about her husband's fate and that no additional information existed, Ms. Harbury alleged, she would have filed her FOIA request much sooner, learned of the Government's complicity in Mr. Bamaca's kidnaping and torture prior to the time of his execution, and sought injunctive relief in order to save his life. Mr. Bamaca is now dead, and injunctive relief is permanently foreclosed. Third, Ms. Harbury claimed that all three sets of defendants violated Ms. Harbury's right of familial association by conspiring to end the life of her husband and by interfering with her efforts to investigate her husband's disappearance. Finally, Ms. Harbury asserted a variety of common law torts against the defendants, including intentional infliction of emotional distress, negligent

supervision, and intentional and negligent misrepresentation.

In March 1999, the District Court dismissed all of Ms. Harbury's constitutional claims, Pet. App. 30a, entering final judgment on this decision in August of that year. *Id.* at 60a. With respect to Mr. Bamaca's due process claim, the court held that as a foreign national residing in a foreign country, Mr. Bamaca was not entitled to Fifth Amendment substantive due process protections. *Id.* at 36a-43a. With respect to Ms. Harbury's access to courts claim, the court held that Ms. Harbury could not bring such a claim because she had not attempted to seek a state court remedy first, and even if she had the defendants would be entitled to qualified immunity. *Id.* at 43a-49a. With respect to Ms. Harbury's claim based on her right of familial association, the court held that Ms. Harbury had not stated a claim because she had not alleged that the defendants directly targeted her relationship with Mr. Bamaca by their actions. *Id.* at 52a. Ms. Harbury's common law tort claims remain pending before the District Court.

On appeal, the D.C. Circuit upheld the District Court's dismissal of Mr. Bamaca's substantive due process claim and Ms. Harbury's familial association claim. *Id.* at 1a. With respect to Mr. Bamaca's Fifth Amendment due process claim, the court held that the case was governed by *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), in which the Supreme Court had found that the warrantless search and seizure of an alien's property in Mexico did not violate the Fourth Amendment. Pet. App. 12a. With respect to Ms. Harbury's familial association claim, the court observed that this Court has found a constitutional right to continuing association with family members only where there is an allegation of direct and purposeful government conduct. *Id.* at 18a-19a (citing *Stanley v. Illinois*, 405 U.S. 645 (1972) and *Santosky v. Kramer*, 455

U.S. 745 (1982)). The court also agreed with its sister circuits that the constitutional right to familial association protects only the parent-child relationship, and not the marital relationship. *Id.* at 18a-20a (citing *Valdivies Ortiz v. Burgos*, 807 F.2d 6, 9 (1st Cir. 1986)).

The D.C. Circuit disagreed with the District Court in one respect, however, overturning its decision on the access to courts claim. The court began by noting that the right of access to courts not only protects the ability to get into court, "but also ensures that such access be 'adequate, effective, and meaningful.'" *Id.* at 21a (quoting *Bounds v. Smith*, 430 U.S. 817, 822 (1977)). The court then observed that there was a uniform consensus in the circuit courts, developed over nearly two decades of litigation, that a government cover-up can form the basis for an access to courts claim. *Id.* at 21a-22a (citing *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984); *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983); *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986); *Vasquez v. Hernandez*, 60 F.3d 325 (7th Cir. 1995); *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir. 1997); *Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998)).

The court then concluded that Ms. Harbury had pled a violation of the constitutional right of access to the courts. The court rejected the argument that her claim was insufficient because she had not first attempted to bring a state court claim. Although a plaintiff would normally have to demonstrate that her right of access was harmed by showing what actually happened in a state court proceeding, the court reasoned that such a prerequisite is unnecessary in the limited number of cases in which bringing such a proceeding would necessarily be "futile." *Id.* at 26a (citing *Swekel v. River Rouge*, 119 F.3d 1259, 1264 n.2 (6th Cir. 1997)). The court recognized that this

was such a case: as the court observed, by the time Ms. Harbury learned of the Government's complicity in her husband's imprisonment and torture, it was too late for her to take effective legal action to save his life – Mr. Bamaca was already dead. *Id.* at 24a-25a. With respect to the petitioners' claim of qualified immunity, the court emphasized that Ms. Harbury had pled that the petitioners engaged in this deception for the express purpose of preventing Ms. Harbury from filing legal action in the first place. *Id.* at 27a. Given that every circuit court to consider the issue had concluded that the constitution is violated in such circumstances, the court held that it was "obvious" that public officials may not affirmatively mislead citizens in order to protect themselves from legal liability. *Id.* at 28a.

The defendants below filed timely motions for Rehearing and for Rehearing En Banc, each of which was denied. In the Order accompanying the denial of the Petition for Rehearing, the D.C. Circuit responded directly to several of the arguments petitioners again advance here. In particular, the court explained that the defendants misstated the scope of the court's holding. "[T]he opinion will not open the courts to a flood of constitutional access to courts claims," the court explained, because the holding itself is very narrow. Pet. App. 61a-62a. The court emphasized that its holding applied only to situations where, as alleged by Ms. Harbury, "defendants both affirmatively mislead plaintiffs *and* do so for the very purpose of protecting government officials from suit." *Id.* at 62a (emphasis in original). Moreover, the court noted, it had adopted the "general requirement" that a "plaintiff must first press her underlying claims to ensure that the alleged cover-up in fact prejudiced her ability to seek relief." *Id.* Ms. Harbury's claim was permitted to advance, the court explained, only because, if the facts she pled are correct, "defendants' actions

'completely foreclosed' one of her primary avenues of relief." *Id.* (internal citation omitted).[1] The court also noted that the opinion was limited to cases, like Ms. Harbury's, in which "most of the essential facts" of a cause of action were hidden. *Id.* (internal quotation omitted). Thus, it did not apply to cases in which a prospective plaintiff, while still lacking some information, was at least aware of enough facts with which she could *initiate* legal action. Finally, in response to the assertion that the holding below would negatively affect national security, the court made clear that "the Government never claimed, either before the district court or the panel, that the cover-up alleged by Harbury was necessary to maintain national security." *Id.* The court noted that the Government remained free to assert a national security defense before the District Court. *Id.*

After the Solicitor General declined to file a Petition for a Writ of Certiorari on behalf of the petitioners, the instant petition was filed.

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[1]The court concluded that Ms. Harbury had specifically stated, in her brief and as amplified at oral argument, that had she learned of her husband's situation while he was still alive she would have immediately sought injunctive relief based on various tort theories. Pet. App. 63a. Although defendants disputed whether such a claim would have been successful, the court observed that on a motion to dismiss, Ms. Harbury was entitled to have "any ambiguities or doubts concerning the sufficien[illegible] of the claim . . . be resolved in [her] favor." *Id.* (citing *Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1102 (D.C. Cir. 1985)).

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' ANALYSIS OF THE UNDERLYING CONSTITUTIONAL CLAIM IS COMPLETELY CONSISTENT WITH THIS COURT'S PRECEDENTS.

In this case the court below held, consistent with *every* court of appeals to have considered the question, that the constitutional right of access to courts is violated when "public officials affirmatively mislead citizens in order to prevent them from filing suit." Pet. App. 28a; *see Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984) ("[The right of access] is lost where, as here, police officials shield from the public and the victim's family key facts which would form the basis of the family's claims for redress"); *Ryland v. Shapiro*, 708 F.2d 967, 973-75 (5th Cir. 1983) (A litigant's right is prejudiced by "[c]onduct by state officers which results in delay in the prosecution of an action in state court"); *Barrett v. United States*, 798 F.2d 565, 575 (2d Cir. 1986) ("Unconstitutional deprivation of a cause of action occurs when government officials thwart vindication of a claim by violating basic principles that enable civil claimants to assert their rights effectively."); *Vasquez v. Hernandez*, 60 F.3d 325, 328 (7th Cir. 1995) ("[W]hen police officers conceal or obscure important facts about a crime from its victims rendering hollow the right to seek redress, constitutional rights are undoubtedly abridged."); *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir. 1997) ("[I]f a party engages in actions that effectively cover-up evidence . . . they have violated his right of access to the courts."); *Delew v. Wagner*, 143 F.3d 1219, 1222 (9th Cir. 1998) ("[T]he Constitution guarantees plaintiffs the right of meaningful access to the courts, the denial of which is established where a party engages in pre-filing actions which

effectively covers-up evidence."). This unremarkable holding in no way diverges from any precedent of this Court.

Given that every circuit court of appeals to have considered the question has reached the same conclusion, petitioners are forced to assert that the Court should grant certiorari "to review the entire direction of lower court decisions in this area. . . ." Pet. at 18. But there is plainly no need for such sweeping review. These courts have merely recognized, consistent with this Court's precedent, that "government cover-ups can infringe the right of access to courts." Pet. App. 21a. Such a rule is entirely consistent with this Court's holding that the right of access not only guarantees physical access to the court, but also ensures that such access be "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977).

Petitioners nonetheless assert that this entire line of cases conflicts with the limits on the right of access to courts set forth in *Lewis v. Casey*, 518 U.S. 343 (1996).[2] That assertion is meritless. In *Casey*, the Court overturned a lengthy district court injunction aimed at reforming a prison's legal system, holding (on standing grounds) that the injunction went far beyond what was necessary to cure the actual harm documented by the court. 518 U.S. at 357-60. In doing so, the Court observed that a cognizable injury could not be shown by the mere fact that the prison legal system failed to affirmatively assist prisoners in discovering grievances or to litigate them effectively in court. *Id.* at 354. Such a requirement, the Court observed, would be tantamount to requiring "permanent provision of counsel." *Id.*

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[2]Petitioners identify this case, mistakenly, as *Lewis v. Fletcher*. Pet. at 16.

But none of the myriad cases petitioners ask this Court to overturn rely on the premise that a constitutional right is violated when a government official fails to provide information that would aid in the prosecution of a claim. Instead, these cases make clear that the constitutional right of access to courts is violated when government officials affirmatively *cover up* relevant information for the purpose of preventing a plaintiff from seeking judicial redress. *See* Pet. App. 27a. ("Harbury alleges not that defendants violated an affirmative duty to provide information, but that they affirmatively misled her . . . Furthermore, defendants misled her, she alleged, precisely *because* they feared that if they gave her accurate information about Bamaca's fate, she might sue them.") (emphasis in original); *see also Bell*, 746 F.2d at 1261 ("[The right of access] is lost where, as here, police officials shield from the public and the victim's family key facts which would form the basis of the family's claims for redress"); *Vasquez*, 60 F.3d at 328 ("[W]hen police officers conceal or obscure important facts about a crime from its victims rendering hollow the right to seek redress, constitutional rights are undoubtedly abridged."). *Lewis v. Casey* is simply inapposite.

Petitioners' argument that this entire line of cases conflicts with this Court's procedural due process jurisprudence fares no better. This argument fails to recognize that Ms. Harbury is asserting a violation of a *substantive* constitutional right – and one that has been recognized by this Court throughout a century of jurisprudence. *See Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts is the alternative of force . . . It is one of the highest and most essential privileges of citizenship"); *Bounds*, 430 U.S. at 822. The cases cited by petitioners, by contrast, concern only whether property has been taken without adequate procedural

protections. *See Parratt v. Taylor*, 451 U.S. 527, 536-37 (1981) ("Respondent here refers to no other right, privilege, or immunity secured by the Constitution or federal laws other than the Due Process Clause of the Fourteenth Amendment *simpliciter* . . . Our inquiry therefore must focus on whether the respondent has suffered a deprivation of property without due process of law"), *overruled by Daniels v. Williams*, 474 U.S. 327 (1986); *Hudson v. Palmer*, 468 U.S. 517, 530 (1984) (Respondent asserted that destruction of personal property "deprived him of property without due process"); *Lujan v. G&G Fire Sprinklers, Inc.*, 121 S. Ct. 1446, 1450 (2001) ("we inquire whether the State has deprived the claimant of a protected property interest"). These cases are simply inapplicable.

II. THERE IS NO CIRCUIT SPLIT ON ANY QUESTION PRESENTED IN THIS PETITION

In an effort to make this case appear certworthy, petitioners also attempt to conjure up a split between the circuits on the necessary elements of an unconstitutional deprivation of access to courts claim. As set out below, petitioners fail. In recognizing the claims at issue, the D.C. Circuit merely applied law that is well established, without altering its contours in any way.

1. Petitioners first attempt to manufacture a circuit split in this case by asserting that other circuits have imposed a rigid "exhaustion" requirement, and that the D.C. Circuit eliminated that requirement. *See* Pet. at 19-21, *citing Swekel v. River Rouge*, 119 F.3d 1259 (6th Cir. 1997) and *Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998). Petitioners misstate the holdings of each of those courts and of the court below.

In both *Swekel* and *Delew*, the Courts of Appeals for the Sixth and Ninth Circuits recognized the non-controversial proposition that, in order to determine whether a government official's action has impeded a plaintiff's ability to seek redress, the plaintiff must typically show that, in fact, her ability to bring a claim has been rendered less effective. *Swekel*, 119 F.3d at 1264 ("Before filing an 'access to courts' claim, a plaintiff must make some attempt to gain access to the courts; otherwise, how is this court to assess whether such access was in fact 'effective' and 'meaningful'?"); *Delew*, 143 F.3d at 1222 (plaintiff must show that defendants' conduct "actually render[ed] any state court remedies ineffective"). Thus, *Swekel* and *Delew* indicate that before a plaintiff can state a constitutional claim of denial of access to the courts she must ordinarily attempt, and fail, to obtain an adequate remedy in state courts.

The D.C. Circuit did not reject this general rule. Indeed, in its opinion, the court cited both *Swekel* and *Delew* with approval. Pet. App. 23a-24a. And in its Order denying the Petition for Rehearing, the court reiterated that its opinion "endorses the general requirement that prior to bringing a claim for deprivation of access to courts based on an alleged cover-up, plaintiff must first press her underlying claims to ensure that the alleged cover-up in fact prejudiced her ability to seek relief." *Id.* at 62a. As the court observed, however, the actions allegedly taken by the Government in this case did not only prejudice Ms. Harbury's ability to seek adequate relief, they "completely foreclosed" her ability to do so. *Id.* at 25a; *see also id.* at 62a. Specifically, by the time the Government's involvement in her husband's detention came to light, Ms. Harbury's husband was dead, and she was thus unable to seek emergency injunctive relief that could have saved his life. *Id.* at 24a, 62a. The court below sensibly declined to require

plaintiff to file what would have necessarily been a futile state court claim prior to bringing her access to courts claim.[3]

Nothing in that decision conflicts with the decisions of any other court of appeals. Indeed, one of the cases on which petitioners primarily rely – *Swekel* – explicitly acknowledges that the requirement that a plaintiff first attempt to bring a state court claim would not be relevant if such an action would be "completely futile." 119 F.3d at 1264 n.2. *Delew* is even less helpful to the petitioners. There, relying on *Swekel*, the court merely ordered a constitutional right of access claim to be dismissed without prejudice so that a state court action could be initiated first. 143 F.2d at 1223. As no party to that proceeding contended that such a state court action would have been futile, the holding has no relevance here whatsoever.

Petitioners concede, as they must, that in this case, a state court action would be futile. Pet. at 21 ("There is, of course, no doubt that death constitutes a substantial and irreparable harm

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[3]Petitioners' assertion that the court below held that a plaintiff not only has a constitutional "right to access the courts, but he or she can now lay claim to secure a particular and more desirable outcome," Pet. at 20 (emphasis in original omitted), is specious. The court merely held that where the actions of the defendants render a subsequent state court claim futile, a plaintiff is not required to first file such a state court claim. The petitioners do not claim – nor could they – that a remedy exists now that would be adequate given Mr. Bamaca's intervening death.

Any other result would be senseless. Indeed, under petitioners' reasoning, Ms. Harbury would be forced to seek an injunction prohibiting the very thing that has already occurred – her husband's death. Only after a state court denied such injunctive relief – as it would obviously be forced to do given that the request would be moot – could she bring the instant claim. Unsurprisingly, no court has ever suggested that such a nonsensical course of action is necessary.

that cannot be undone by any later proceedings."). The petitioners do not offer any sound justification for requiring the waste of time and judicial resources that the filing and dismissal of a necessarily futile lawsuit would entail. Instead, they attempt to bolster their claim of a circuit split by arguing that their complaint is actually that the decision below would permit access to court claims to proceed any time the plaintiff "could plausibly claim some entitlement to injunctive relief." *Id.* But that is a strawman. The D.C. Circuit did not hold that an access to courts claim can proceed any time a plaintiff could otherwise seek injunctive relief. Instead, the court held only that a plaintiff need not first attempt to file a state court claim if filing such a claim would necessarily be futile. Pet. App. 24a. Such a conclusion is both unremarkable and fully consistent with the decisions of other courts of appeals.

2. Petitioners' second attempt to manufacture a circuit split is equally flawed. Petitioners assert that the D.C. Circuit's conclusion that a claim can be based on the deliberate deception of government officials which was designed to prevent a plaintiff from seeking judicial redress conflicts with two cases in which courts have held that government conduct that is merely misleading cannot form the basis of an access to courts claim. Again, petitioners' claims are simply wrong. Neither of the two cases relied on by petitioners – *Bell v. Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) and *Vasquez v. Hernandez*, 60 F.3d 325 (7th Cir. 1995) – nor any other case holds that misleading government conduct may not serve as a factual predicate for an access to courts claim.

Indeed, *Bell* itself refutes the petitioners' claim. In that case, the court found several sets of government defendants liable for a violation of the right of access to courts. The first was the police officers who had, in fact, fabricated evidence.

The second set of government officials, however, consisted of detectives who did not have "complete knowledge of what happened the night of the killing," but were "cognizant of glaring inconsistencies and conflicts in [the police officer's] explanation," and in response "facilitated an explanation more favorable to the police department." *Bell*, 746 F.2d at 1262. The *Bell* court also found that the District Attorney – who was aware of the true facts but who nonetheless presented a biased and misleading examination during an inquest into the police officers' conduct – "presented a formidable obstacle to learning the facts and vindicating the [victim's] death." *Id.*; *see also id.* ("the jury could reasonably conclude that the concealment interfered with the Bell family's efforts to seek redress"). Thus, *Bell* plainly does not hold that there must be more than deliberate interference with the right to pursue a claim.

Vasquez similarly offers no support for the petitioners. There, the court merely held that the inadequacy of a police investigation could not constitute a denial of the right of access to the courts because it resulted in only a short delay before the plaintiffs learned the full truth. 60 F.3d at 329. That case rested not on any wrongfulness of the defendants' conduct, but merely on "the magnitude of the injury suffered." *Id.* The case had nothing whatsoever to do with the question of whether deliberate government deception can be the basis for an access to courts claim.

Properly read, *Bell* and *Vasquez* are merely two in a long line of cases to hold that government officials violate the Constitution by interfering with a plaintiff's ability to bring a claim. *See*, *e.g.*, *Ryland*, 708 F.2d at 973 (right to access violated where "agents of the state intentionally engaged in conduct that interfered with [the] exercise of . . . constitutionally protected right to institute a wrongful death

suit"); *Foster v. City of Lake Jackson*, 28 F.3d 425, 430 (5th Cir. 1994) (right of access violated by "an officially-created impediment to the ability to file an action"); *Swekel*, 119 F.3d at 1262 ("if a party engages in actions that effectively cover-up evidence . . . they have violated his right of access to the courts."). As *Bell* itself makes plain, biased and misleading conduct is often at the heart of such a cover-up. *Bell*, 746 F.2d at 1262.[4]

III. THE COURT OF APPEALS' QUALIFIED IMMUNITY ANALYSIS WAS CONSISTENT WITH SETTLED CASE LAW.

Petitioners also assert that the D.C. Circuit's opinion was inconsistent with this Court's qualified immunity cases. This assertion is baseless. The D.C. Circuit properly found that the contours of the constitutional right to access were "sufficiently clear that a reasonable official would understand that what he is doing violates that right." Pet. App. 26a (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

As an initial matter, petitioners complain that, while the law on this point is unsettled, it appears that only controlling authority from the relevant circuit may be considered to

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[4]Petitioners also attempt to bootstrap their purported split by pointing to the fact that Ms. Harbury claimed that keeping her from accessing the courts was *one* (as opposed to the only) of the Government defendant's express objectives. Pet. at 22. Although petitioners now assert that they "might" have been motivated by national security considerations, Pet. at 28, that fact is irrelevant here, as this case comes to the Court on a motion to dismiss. In any event, this argument is difficult to credit given that the Government itself later declassified and provided to Ms. Harbury the very information which would have enabled her to proceed to the courts for emergency relief to save her husband's life.

determine whether a principle of law is clearly established. Pet. at 24.[5] But that is not an accurate statement of the law. To the contrary, this Court has made clear that a plaintiff may either cite to "controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely" *or* identify "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Wilson v. Layne*, 526 U.S. 603, 617 (1999). Indeed, as the petitioners themselves concede, this Court has made abundantly clear that it is appropriate for courts to look at precedent outside their own circuit to determine if a principle of law is clearly established. *See* Pet. at 23 (noting that this Court has stated "that a 'court engaging in review of a qualified immunity judgment should therefore use its full knowledge of its own [and other relevant] precedents.' *Elder v. Holloway*, 510 U.S. 510, 516 (1994) (quotation omitted; brackets in original)"). That, of course, is precisely what the court below did – it reviewed the case law from other circuits and concluded, based on the clear consensus of other courts, that the relevant principle of law was clearly established.

Petitioners also raise two specific complaints with respect to the D.C. Circuit's qualified immunity analysis.

Petitioners' first critique is that the D.C. Circuit failed to recognize that the law is not clearly established with respect to whether a plaintiff must first press a claim in state court before bringing a constitutional claim based on access to the courts. Pet. at 25. As discussed in detail above, *see supra* at 14-19, no

[5]Although the petitioners complain about the state of the law, they do not ask the Court either in the questions presented or in the body of their Petition to grant review to address the purported confusion. In any event, as explained above, the relevant state of the law is clear.

such circuit split exists. Equally importantly, however, this issue has absolutely nothing to do with qualified immunity. The question to be answered with respect to qualified immunity is whether government officials can reasonably be deemed to be on notice that certain *conduct* is proscribed. Thus, as the D.C. Circuit explained, "[t]he relevant inquiry . . . is this: would an objectively reasonable official have thought it clearly unconstitutional to affirmatively mislead Harbury for the express purpose of preventing her from filing a lawsuit?" Pet. App. 27a. The answer to that question is plainly not dependent on whether a plaintiff has to jump through the procedural hoop of bringing a state court claim before she could bring an access to courts claim. Simply put, even if petitioners were correct with respect to their "exhaustion" argument – and they are not – that would have absolutely no bearing on whether a reasonable government official would understand that the *conduct* that would form the basis for such a claim is forbidden.

Petitioners' second assertion is that the state of the law in other jurisdictions was "nebulous" at the time of the events in question. Remarkably, petitioners point to *Foster v. City of Lake Jackson*, 28 F.3d 425, 430 (5th Cir. 1994) in support of this argument. *Foster*, however, holds precisely the opposite – that opinion states in no uncertain terms that the right of access was "*clearly established* in 1985-1988." *Id.* at 430 (emphasis added). The only "contours" the *Foster* court found nebulous were those involving the right to proceed free of discovery abuses after the filing of a lawsuit – issues which are plainly not implicated here. *Id.*

The petitioners similarly assert that the D.C. Circuit relied on law that postdated the conduct of the officials sued here. That claim is also wrong. The principal cases upon which the court relied were decided prior to the conduct in question in

this case. *See, e.g.*, *Bell*, 746 F.2d at 1261; *Ryland*, 708 F.2d at 973-75; *Barrett*, 798 F.2d at 575. The court did note that every circuit to have considered the issue at any time has reached the same conclusion. *See* Pet. App. 28a ("Not only have five of our sister circuits held that cover-ups that conceal the existence of a cause of action (or make it difficult to prosecute one) infringe the constitutional right of access to courts, and not only are we unaware of any contrary decision, but we think it should be obvious to public officials that they may not affirmatively mislead citizens for the purpose of protecting themselves from suit."). But the fact that the courts are unanimous in their treatment of this issue – and that the D.C. Circuit so noted – hardly demonstrates that the court misapplied the doctrine of qualified immunity.

IV. NO OTHER COMPELLING REASON EXISTS TO GRANT CERTIORARI IN THIS CASE

Finally, petitioners make the strained argument that review is warranted due to the practical consequences of this ruling – particularly that the decision below will harm U.S. foreign policy and intelligence interests. Pet. at 27-29. Notably, this argument is being made by private counsel for the petitioners because the Government – which has represented the petitioners up to this point – declined to seek review of the decision below.[6] Given that, it is extremely difficult to credit the dire predictions made by the petitioners.

In any event, these claims have no merit. First petitioners

[6]At the time of the events at issue, the petitioners were all government employees. Accordingly, the Government has represented them throughout this litigation. Nonetheless, the Solicitor General's office declined to seek review of the D.C. Circuit's decision.

rehash their argument that the ruling below will lead to a flood of litigation because the court held that anyone who can assert that they once had a right to injunctive relief could immediately bring an access to courts case. As explained above, this contention is wrong. Under the D.C. Circuit's holding the only injunctive claims that can be brought without recourse to state tribunals first are those in which there is no longer the possibility of an adequate remedy through injunctive relief by the time the existence of the cause of action is learned – an extremely narrow subset of cases. *See, e.g.*, Pet. App. 61a-62a ("the opinion will not open the courts to a flood of constitutional access to courts claims" because of the narrowness of the holding).

Second, petitioners renew their argument that the D.C. Circuit opinion "sweeps into its orbit" any cases in which government officials are acting with mixed motivations – that is, where government officials may have sought not only to prevent a lawsuit but also to preserve legitimate national security secrets. Pet. at 28. Again, this overstates the D.C. Circuit's holding. As the court's opinion makes clear, had the petitioners simply refused to answer Ms. Harbury's questions – or had they simply issued a so-called "Glomar" response, refusing to confirm or deny the contended allegation, *see Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999) – there would be no basis for any legal claim against them. Only when petitioners went further and deliberately *deceived* Ms. Harbury – and did so, at least in part, to shield themselves from liability – did they subject themselves to potential legal liability. *See* Pet. App. 23a ("Instead of saying (as they could have) that they were unable to discuss Bamaca's situation, they sought to lull her into believing that they were working on her behalf, intending to prevent her from suspecting that the U.S. Government was actually involved in Bamaca's torture. One

of their express objectives, Harbury alleges, was to prevent her from suing them.").

Finally, petitioners argue that as a result of the D.C. Circuit's opinion, government officials will have to weigh the potential risk of legal liabilities when they respond to requests for information "or engage in public discussion on serious topics." They also assert that the fact that the D.C. Circuit has jurisdiction over activities in the Nation's capital will cause a "chilling effect" on the conduct of foreign affairs and intelligence activities. Pet. at 28-29. But that is wrong for two reasons. First, there is no question that the Government remains free to respond to any inquiry with a "Glomar" response, refusing to confirm or deny the contended allegation. Accordingly, nothing in the opinion below remotely requires the Government to volunteer information to all who ask. Instead, it merely applies to situations in which "defendants both affirmatively mislead plaintiffs *and* do so for the very purpose of protecting government officials from suit." Pet. App. 62a.[7] Moreover, as the court noted, although the Government has declined to do so in this case at this juncture, it may always assert a national security defense. *Id.* In short, nothing about this case warrants review.

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[7]In any event, public officials, even those entrusted with our nation's most sensitive national secrets, may not respond to requests for information by engaging in slander, or threatening to blackmail a private citizen, or sexually harassing a subordinate. Petitioners provide no explanation why public officials should be privileged to use their public speech to deprive someone of "the right to sue and defend in the courts." *Chambers*, 207 U.S. at 148.

V. REVIEW WOULD BE PREMATURE

Petitioners seek review of an order that, by its own terms, "resolves some but not all of the claims against some but not all of the parties." *Harbury v. Deutch*, Order and Judgment, August 8, 1999, Pet. App. 60a. Although the District Court entered judgment on the *Bivens* claims that are presently before this Court, the District Court still has before it a number of common law tort claims that arise from the same set of facts and circumstances. Limited jurisdictional discovery on those claims is presently ongoing and the facts to be developed at trial would aid the lower courts – and, if need be, this Court – by ensuring that review takes place on the basis of a fully developed factual record. *See Virginia Military Institute v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in the denial of certiorari) ("We generally await final judgment in the lower courts before exercising our jurisdiction.").

Moreover, as the petitioners have yet to answer Ms. Harbury's complaint in this litigation, they have yet to interpose any defenses they may have to the *Bivens* claims that are the subject of this Petition. The petitioners suggest to this Court that they "might" have engaged in the alleged cover-up in order to protect national security. Pet. at 28. In its ruling *en banc*, however, the D.C. Circuit pointed out that the petitioners had not yet asserted a national security defense to the allegations in Ms. Harbury's complaint, but that they were free to do so when they answered the complaint. Pet. App. 62a. Accordingly, review at this time would be premature.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

WARREN CHRISTOPHER, MARILYN MCAFEE, ALEXANDER WATSON, ANNE PATTERSON, PEG WILLINGHAM, ANTHONY LAKE, and RICHARD E. FEINBERG,

Petitioners,

v.

JENNIFER K. HARBURY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

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REPLY BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether allegations that senior State Department and National Security Council officials withheld information and intentionally misled a private citizen about a foreign rebel leader in the captivity of a foreign government state a violation of the constitutional right of access to the courts, when the only claim is that defendants' speech was intentionally misleading and there are no allegations that the plaintiff ever tried to file a lawsuit and was actually hindered in that effort?

2. If the Court concludes that a constitutional violation is properly grounded on allegations such as these, whether government officials violate clearly established law whenever they allegedly mislead a private citizen or conceal information and it is later claimed that they intended to and did hinder the filing of a hypothetical lawsuit?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

REPLY TO BRIEF IN OPPOSITION 1

I. THE SUBSTANTIVE DUE PROCESS RIGHT ENDORSED IN THE RULING BELOW GOES FAR BEYOND THE COURT'S PRECEDENTS 1

II. THE CIRCUITS ARE SPLIT ON KEY ELEMENTS OF ANY CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS IN THIS CONTEXT 4

III. THE COURT OF APPEALS MISAPPLIED THIS COURT'S PRECEDENTS AND PLAINLY ERRED BY DENYING QUALIFIED IMMUNITY HERE 6

IV. THE RULING BELOW IS FAR-REACHING AND HAS SERIOUS CONSEQUENCES FOR FOREIGN POLICY AND INTELLIGENCE EFFORTS 8

CONCLUSION 10

TABLE OF AUTHORITIES

PAGE

Cases

Barrett v. United States, 798 F.2d 565 (2d Cir. 1986) 8
Behrens v. Pelletier, 514 U.S. 1035 (1995) 3
Behrens v. Pelletier, 516 U.S. 299 (1996) 1, 3
Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984) 6
Boddie v. Connecticut, 401 U.S. 371 (1977) 1
Bounds v. Smith, 430 U.S. 817 (1977) 1, 2
Chambers v. Baltimore & O.R.R., 207 U.S. 142 (1907) ... 1
Collins v. City of Harker Heights, 503 U.S. 115 (1992) ... 2
Crowder v. Sinyard, 884 F.2d 804 (5th Cir. 1989), *cert. denied*, 496 U.S. 924 (1990) 2, 5, 7, 8
Delew v. Wagner, 143 F.3d 1219 (9th Cir. 1998) 4, 5, 6
DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989) 2
Ellis v. Magee & Devereux, 2001 WL 167744 (E.D. La. Feb. 15, 2001) 7
Foster v. City of Lake Jackson, 28 F.3d 425 (5th Cir. 1994) 7
Hanlon v. Berger, 525 U.S. 981 (1998) 3
Hunter v. Bryant, 502 U.S. 224 (1991) (per curiam) 8
Illinois v. Perkins, 496 U.S. 292 (1990) 3
Johnson v. Avery, 393 U.S. 483 (1969) 2
Lewis v. Casey, 518 U.S. 343 (1996) 2
Malley v. Briggs, 475 U.S. 335 (1986) 8
Mitchell v. Forsyth, 472 U.S. 511 (1985) 1, 7
Parratt v. Taylor, 451 U.S. 527 (1981) 3, 5
Paul v. Davis, 424 U.S. 693 (1976) 3
Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983) 8
Stafford v. Briggs, 439 U.S. 1113 (1979) 3
Swekel v. City of River Rouge, 119 F.3d 1259 (6th Cir. 1997) 4, 5
Thornburgh v. Abbott, 490 U.S. 401 (1989) 2

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

Totten v. United States, 92 U.S. 105 (1876) 9
Troxel v. Granville, 530 U.S. 57 (2000) 3
Vasquez v. Hernandez, 60 F.3d 325 (7th Cir. 1995) 6
Wilson v. Layne, 526 U.S. 603 (1999) 1, 7, 8

Constitutional Provisions and Rules

U.S. CONST. amend. V ..... *passim*
S. CT. R. 10(c) 3
28 C.F.R. 50.16 (2000) 3

Other Authorities

David E. Sanger & Steven Lee Myers, *President Says U.S. Is "in Hot Pursuit" of Terror Group*, N.Y. TIMES, Sept. 29, 2001, at A1 10
The Trial of Aaron Burr, 1 ROBERTSON'S REPORTS 186 ... 9

REPLY TO BRIEF IN OPPOSITION

Both issues presented merit review. *First*, the substantive due process claim for denial of access to the courts cannot be squared with the Court's precedents, supplants ordinary judicial procedures, and creates serious practical impediments to American foreign policy and intelligence efforts. *Second*, the qualified immunity analysis below clearly contravenes the Court's repeated directions and justifies summary reversal.[1]

I. THE SUBSTANTIVE DUE PROCESS RIGHT ENDORSED IN THE RULING BELOW GOES FAR BEYOND THE COURT'S PRECEDENTS.

Petitioners have discussed how the right-of-access claim fashioned in this case goes far beyond the Court's precedents. *See* Pet. 15-18. Significantly, respondent does not deny the aggressive scope of this right, but counters that it flows naturally from cases such as *Bounds v. Smith*, 430 U.S. 817 (1977), and "has been recognized by this Court throughout a century of jurisprudence." Opp. 13.

With all due respect, the "*substantive* [due process] right" championed by respondent and accepted by the court below, Opp. 13 (emphasis in original), has nothing in common with this Court's precedents. Those decisions fall into two narrow categories: they involve *either* institutional mechanisms directly barring access to the courts, *see, e.g.*, *Chambers v. Baltimore & O.R.R.*, 207 U.S. 142, 147-50 (1907); *Boddie v. Connecticut*,

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[1] Respondent claims that review is "premature" since this case arises on a motion to dismiss, Opp. 25, but fails to recognize this as the standard posture for many of the Court's qualified immunity cases because an "entitlement not to stand trial or face the other burdens of litigation" is at stake. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *see also Behrens v. Pelletier*, 516 U.S. 299, 305-11 (1996). Moreover, the courts "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

401 U.S. 371, 374-83 (1977), *or* arbitrary restrictions on judicial access for prisoners held in government custody, *see, e.g.*, *Bounds*, 430 U.S. at 821-33; *Johnson v. Avery*, 393 U.S. 483, 485-90 (1969). But there is no institutional bar to suit in this case, and the prisoner cases are distinct because in the "substantive due process analysis, it is the State's affirmative act of restraining the individual's right to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the 'deprivation of liberty' triggering the protections of the Due Process Clause." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 200 (1989). No such denial of liberty has occurred here, and therefore cases such as *Bounds* are entirely inapposite: "In the world of litigation outside prison walls, ... ordinary individuals do not find any physical barriers between them and the courts." *Crowder v. Sinyard*, 884 F.2d 804, 811-12 (5th Cir. 1989), *cert. denied*, 496 U.S. 924 (1990).

Nonetheless, the court below squarely held that government officials violate the right of access to the courts when they hinder private citizens from filing even hypothetical lawsuits by misrepresenting information, and at least *one* of their purposes was to forestall a lawsuit. *See* Pet. App. 28a, 23a. This ruling reaches out to constitutionalize issues adequately addressed by other means, and it cannot be reconciled with the Court's recent precedents that curtail the scope of this right. *See, e.g., Lewis v. Casey*, 518 U.S. 343 (1996); *Thornburgh v. Abbott*, 490 U.S. 401, 409-12 (1989). Respondent can suggest various factual distinctions, but the important core holding in this case is utterly out of harmony with these decisions. *See Lewis*, 518 U.S. at 354-55; *id.* at 365 (Thomas, J., concurring) (expressing doubts about *Bounds* and "a loosely defined 'right of access to the courts'"). The ruling below is also at odds more generally with the Court's explicit reluctance to expand substantive due process rights. *See, e.g., Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process, because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."); *Troxel v. Granville*, 530 U.S. 57, 76 (2000) (Souter, J., concurring) (cautioning against "turning any fresh furrows in the treacherous field of substantive due process") (quotation omitted).

Respondent's attempt to distance this case from the Court's procedural due process decisions, *see* Opp. 13-14, only serves to highlight the defective analysis of lower courts that find constitutional violations even though plaintiffs cannot establish that they have been deprived "of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Indeed, respondent never denies that the very permissive formulation of the right-of-access claim embraced by the court below, which discards any meaningful "exhaustion" requirement in any case involving a claim of injunctive relief, would displace an array of existing state judicial remedies and processes, in clear disregard of this Court's consistent warnings. *See, e.g., Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981); *Paul v. Davis*, 424 U.S. 693, 701 (1976). *See also* Pet. 18. And it bears emphasis that the same claim brought by respondent here would arise from deceptive statements made by domestic law enforcement officials in connection with sting operations or undercover investigations where an individual suffered death or imprisonment or some other irreparable harm as a result. *Cf. Illinois v. Perkins*, 496 U.S. 292, 297 (1990) ("*Miranda* forbids coercion, not mere strategic deception" or "[p]loys to mislead a suspect").

Accordingly, this case merits review because the court below "has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. CT. R. 10(c).[2]

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[2] Respondent also suggests that the Court's decision whether to grant review should be determined by the fact that the Solicitor General declined to file a petition for certiorari in this case. *See* Opp. 22. The suggestion is inappropriate. The Solicitor General is well aware of the legal authority for federal officials to be represented by private counsel in these circumstances. *See* 28 C.F.R. 50.16 (2000). Moreover, the Court has not hesitated to grant petitions filed by federal officials in such cases where the importance of the issues warrants review. *See, e.g., Hanlon v. Berger*, 525 U.S. 981 (1998); *Behrens v. Pelletier*, 514 U.S. 1035 (1995); *Stafford v. Briggs*, 439 U.S. 1113 (1979).

II. THE CIRCUITS ARE SPLIT ON KEY ELEMENTS OF ANY CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS IN THIS CONTEXT.

Respondent endeavors to explain away the circuit split that both courts noted below, *see* Pet. App. 46a & n.2 (citing cases); *id.* at 23a-24a, but its discussion merely confirms the division of authority and its dispositive effect here.

The court of appeals recognized that two other circuits decline to uphold access-to-courts claims unless the plaintiff has first tried to file a lawsuit and was actually hindered in that effort. *See* Pet. App. 23a-24a. Respondent notes that the court paid its grudging respects to this concept, *see id.* at 62a, but does not dispute that it dispensed with that key requirement here. Instead, respondent argues that it was correct to do so where the plaintiff can allege some potential source of irreparable harm to justify a particular form of relief that is no longer available on the same terms.

The court below styled this approach as a "futility" exception, but it misinterpreted the conflicting rulings of the Sixth and Ninth Circuits in one crucial respect. *Both* cases require plaintiff to show that the defendant's actions actually rendered "any" state court remedy ineffective. *See Swekel v. City of River Rouge*, 119 F.3d 1259, 1264 (6th Cir. 1997); *Delew v. Wagner*, 143 F.3d 1219, 1222-23 (9th Cir. 1998). The court below, supported by respondent, construed this language to mean that if *some particular* remedy were rendered ineffective, a valid constitutional claim is raised. But the Sixth and Ninth Circuits apply this "exhaustion" requirement much more strictly – even "reprehensible" actions by government officials to cover up evidence in order to ward off a lawsuit, which "substantially prejudice [her] ability to recover in state court," do not amount to a constitutional violation unless she can "show *absolute denial* from state court." *Swekel*, 119 F.3d at 1264 (emphasis added); *see Delew*, 143 F.3d at 1223 (claim can proceed "if in fact the defendants' alleged cover-up actually rendered *all* state court remedies ineffective") (emphasis added). Accordingly, these courts hold that a plaintiff *must* "make some attempt to gain access to the courts" *before* "filing an 'access to courts' claim." *Swekel*, 119 F.3d at 1264; *Delew*, 143 F.3d at 1222-23. Yet the court below held to the contrary.

The Sixth Circuit has pointedly held that "a plaintiff must make some attempt to gain access to the courts; otherwise, how is this court to assess whether such access was in fact 'effective' and 'meaningful'?" *Swekel*, 119 F.3d at 1264. Rather than require respondent first to file a lawsuit pressing her tort claims – as she is actually doing now in this case under the Federal Tort Claims Act – the court of appeals here was content with legal hypotheticals that expand a merely "facilitative" right to *access* the courts into a broad constitutional right to secure a particular most desirable outcome. The Fifth Circuit has fairly condemned this approach: "The constitutional right of access does not, however, guarantee one the right to have one's case proceed in a particular procedural posture *or the right to a particular form of relief*." *Crowder*, 884 F.2d at 813-14 (emphasis added); *see also Parratt*, 451 U.S. at 543-44 ("Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded [in federal court,] that does not mean that the state remedies are not adequate to satisfy the requirements of due process."). Respondent pins the empty label of "strawman" on this argument, Opp. 17, but never even tries to explain why the ruling below will not apply in *every* case where the plaintiffs could plausibly claim some entitlement to injunctive relief, which necessarily includes allegations of irreparable harm.

Respondent does not dispute that insistence on this key "exhaustion" element is dispositive of the proper outcome in this case. Adopting the approach endorsed by the Sixth and Ninth Circuits, the district court held that respondent's claim must be dismissed because she did not allege that she had ever tried to bring an action and been hindered in doing so. *See* Pet. App. 45a-46a. Rejecting that approach, the court of appeals reversed and reinstated her claim. *See id.* at 23a-26a. Therefore, this case squarely presents the circuit split on this issue.

As the district court explained, the circuit courts also are split on how egregious a government official's conduct must be to trigger a valid access-to-courts claim. Other circuits have required much more than allegations that government officials acted with mixed motives to mislead or conceal information they were under no legal duty to provide. *See* Pet. App. 47a. In contrast, respondent confirms that the court below was willing to uphold a constitutional claim based on the provision of "biased and misleading" information where it is alleged that at least *one* of the express objectives was to prevent a lawsuit, even if covering up nefarious activities is not the principal motivation for the defendant's actions. Opp. 17-19. Obviously this standard is much more lenient than the egregious conduct required by other courts,[3] and it further underscores the extent to which the disturbing scope of this constitutional claim departs from this Court's precedents.

In sum, private citizens and public officials will continue to have their claims resolved inconsistently in different jurisdictions – under very different views of their constitutional rights and duties – unless the Court grants review in this case.

III. THE COURT OF APPEALS MISAPPLIED THIS COURT'S PRECEDENTS AND PLAINLY ERRED BY DENYING QUALIFIED IMMUNITY HERE.

The ruling below also conflicts with the Court's precedents on qualified immunity. Respondent admits that *no controlling authority* in 1993 or 1994 held that petitioners' conduct would

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[3] *See, e.g.*, Pet. App. 47a-48a; *Vasquez v. Hernandez*, 60 F.3d 325, 329 (7th Cir. 1995) (denying right-of-access claim where defendants engaged in "inexcusable" conduct intended solely to cover up wrongdoing, but "the cover-up failed to achieve such ends"); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1264-65 (7th Cir. 1984) (upholding access-to-courts claim on "particularly egregious set of facts" where police officers and others fabricated evidence solely to cover up their wrongful conduct); *Delew*, 143 F.3d at 1221-22 (access-to-courts claim can be valid where defendants engaged in wrongful acts with specific intent to cover up details of their prior conduct).

violate any constitutional right of access to the courts. *See* Opp. 19-20. Shortly before, the state of the law in other jurisdictions had been accurately described as "nebulous," *Crowder*, 884 F.2d at 811, and the range of disagreement has only widened since, which compels a finding of qualified immunity.[4] *See Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985); *Wilson*, 526 U.S. at 618.

Respondent tries, unconvincingly, to justify the appellate court's departures from the district court's proper analysis of the qualified immunity issue. *Compare* Pet. App. 47a-49a *with id.* at 26a-28a, 66a-67a. Surely it is absurd for respondent to contend (*see* Opp. 21) that petitioners can be denied qualified immunity where the validity of respondent's constitutional claim on the facts alleged is not "clearly established" – for whatever reason, whether procedural or substantive. Here the court of appeals diverged from the Sixth and Ninth Circuits, which refuse to recognize a claim for denial of access to the courts unless plaintiff first tries to file a lawsuit and is actually hindered in that effort. *See supra* Section II. The district court noted that the lower courts disagree on the constitutional merits (*see id.* at 46a & n.2), which were also disputed within the *en banc* court below, *see id.* at 70a-71a (Henderson & Sentelle, JJ., dissenting from denial of rehearing *en banc*). That is more than enough to justify qualified immunity here. *See Wilson*, 526 U.S. at 618.

Respondent also makes little headway in arguing that the court of appeals relied solely on decisions predating the events in question to show that the law was "clearly established" in

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[4] Respondent contends that *Foster v. City of Lake Jackson*, 28 F.3d 425 (5th Cir. 1994), cleared up this "nebulous" law in the Fifth Circuit, but the court actually upheld qualified immunity there against an access-to-courts claim and expressed skepticism about dropping the "exhaustion" requirement by framing the right in terms of an ability "to institute suit." *See id.* at 428-31 & n.7. Indeed, a recent district court case construed *Foster* as having "clarified that if Plaintiff is able to file suit, the right is simply not implicated," and explicitly criticized the ruling below in this case as "giving the right of access to courts a broader definition than that recognized in this circuit." *Ellis v. Magee & Devereux*, 2001 WL 167744, at *2 & n.3 (E.D. La. Feb. 15, 2001).

favor of the access-to-courts claim. Only three of the six cases cited, *see* Pet. App. 66a-67a; *id.* at 26a-28a, even predate petitioners' conduct, and these cases alone cannot bear the weight respondent places on them. *See Ryland v. Shapiro*, 708 F.2d 967, 975-76 (5th Cir. 1983) (stating tentatively that interference with access to courts "may" amount to a constitutional deprivation but noting defendants may be entitled to qualified immunity); *Crowder*, 884 F.2d at 811 (finding no constitutional deprivation and stating that "the current contours of the right can best be described as nebulous"); *Barrett v. United States*, 798 F.2d 565, 573 (2d Cir. 1986) (finding constitutional violation where defendants allegedly suborned perjury and obstructed discovery, conduct that itself "was also a crime"). This imprecise trio of rulings does not constitute "a consensus of cases of persuasive authority such that a reasonable officer *could not have believed* that his actions were lawful." Opp. 20 (quoting *Wilson*, 526 U.S. at 617) (emphasis added).

Stripped of the rhetoric, at the time petitioners acted, no controlling decision and indeed no ruling by *any* court *anywhere* had definitively adjudged their actions to be unlawful. Summary reversal is therefore warranted here to ensure that qualified immunity continues to protect "'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam summary reversal) (quoting *Malley v. Briggs*, 475 U.S. 335, 343, 341 (1986)).

IV. THE RULING BELOW IS FAR-REACHING AND HAS SERIOUS CONSEQUENCES FOR FOREIGN POLICY AND INTELLIGENCE EFFORTS.

Respondent fails to dispel concern about the grave practical effects of the ruling below. Whenever government officials are alleged to have misrepresented or concealed information, and their alleged motivation is at least in part to avoid or forestall a lawsuit, a constitutional violation would be stated if the plaintiff generates even a hypothetical claim for a particular form of relief that has been prejudiced somehow. Significantly, this broad vision of the right of access to the courts raises the prospect of

injecting constitutional issues into virtually every sting operation or undercover police investigation that involves intentionally deceptive conduct, which is deeply problematic.

Indeed, a viable constitutional claim can be pleaded in any case where the plaintiff can claim that he or she would have brought some form of action for injunctive relief. Such cases, by definition, involve immediate allegations of irreparable harm, where delay inevitably creates prejudice. Cases involving the death of an individual are only one subset of the universe of such cases, which could be as frequent as the disbelief and distrust that potential plaintiffs generate toward government officials whom they contemplate suing. And respondent cannot simply shrug off the "mixed motive" issue with vague comments about how this ruling is supposedly "narrow," given their concession that it does recognize a substantive due process claim whenever officials are motivated, "*at least in part*, to shield themselves from liability." Opp. 23 (emphasis added). The only illusory constraint here lies in having enough wits to muster the necessary speculation about motives in drawing up a pleading.

Finally, the ruling below was upheld by an *en banc* vote of the court of appeals with jurisdiction over the officials who direct the nation's foreign affairs and intelligence efforts. Respondent asserts, as did the court below, that concerns on this score are misplaced because the Government remains free to plead a "national security" defense. Opp. 24. This assertion is highly unsatisfactory. The "national security" defense, which derives from the "State secrets" privilege, far from being a casual matter is an unusual approach reserved only for a most extraordinary case, in which concerns about the national interest can defeat the accepted judicial functions. *See Totten v. United States*, 92 U.S. 105, 107 (1876) (action involving matters of state secret cannot be maintained and must be dismissed without judicial examination). As Chief Justice Marshall once said of the doctrine, "[w]hat ought to be done under such circumstances presents a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country." *The Trial of Aaron Burr*, 1 ROBERTSON'S REPORTS 186. Thus it does not mitigate the unprecedented nature of respondent's constitutional

due process claim to urge the courts to sanction, and indeed to provoke, more such constitutional crises.

It hardly needs to be said that the events of the last two months place these issues in stark relief. As one recent news account observed: "Special operations, by their nature, are cloaked in secrecy and deception, making it impossible to know whether the officials who discuss them obliquely are being completely candid." David E. Sanger & Steven Lee Myers, *President Says U.S. Is "in Hot Pursuit" of Terror Group*, N.Y. TIMES, Sept. 29, 2001, at A1. This observation is just as true with respect to the covert operations at issue in this case as it is with respect to any such operations currently proceeding in various locations around the globe. It is no answer to the many considerations attending this work to say that officials must rigidly confine themselves solely to an empty "Glomar" response without regard to judgments they must make about how best to address such matters. *See* Opp. 23. These pressing concerns strongly reinforce the need to grant review in this case.

CONCLUSION

For the foregoing reasons and those stated previously, this Court should grant the petition for a writ of *certiorari*, and either summarily reverse or set the case for plenary review.

Respectfully submitted,

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Attorney for Petitioners

November 2001

Supreme Court, U.S.
FILED
JAN 24 2002
CLERK

(4)

No. 01-394

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

WARREN CHRISTOPHER, MARILYN MCAFEE, ALEXANDER WATSON, ANNE PATTERSON, PEG WILLINGHAM, ANTHONY LAKE, and RICHARD E. FEINBERG,

Petitioners,

v.

JENNIFER K. HARBURY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

---

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED SEPTEMBER 1, 2001
CERTIORARI GRANTED DECEMBER 10, 2001

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TABLE OF CONTENTS

PAGE

Chronological List of Relevant Docket Entries 1

Second Amended Complaint 19

Motion to Dismiss 65

Opinion of the United States Court of Appeals for the D.C. Circuit ..... Pet. App. 1a

Opinion of the United States District Court for the District of Columbia ..... Pet. App. 30a

Order and Judgment of the District Court .... Pet. App. 60a

Opinion of the Court of Appeals Denying Petition for Rehearing ..... Pet. App. 61a

Opinion of the Court of Appeals Denying Petition for Rehearing En Banc ..... Pet. App. 69a

Letter from William K. Suter, Clerk of the Court to Hon. Theodore B. Olson, June 28, 2001 .. Pet. App. 72a

Letter from William K. Suter, Clerk of the Court to Hon. Theodore B. Olson, July 31, 2001 .. Pet. App. 73a

Order Granting Certiorari (Dec. 10, 2001) 67

U.S. District Court
USDC District of Columbia (Washington)
CIVIL DOCKET FOR CASE #: 96-CV-438

HARBURY V. DEUTCH, et al

Filed: 03/07/96
Assigned to: Judge Colleen Kollar-Kotelly
Jury demand: Both
Demand: $9,999,000
Nature of Suit: 890
Lead Docket: None
Jurisdiction: US Defendant
Dkt# in other court: None
Cause: 28:1331 Fed. Question: Civil Rights Violation

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
3/7/96	1	COMPLAINT filed by plaintiff JENNIFER K. HARBURY, jury demand (ted) [Entry date 03/08/96]
3/7/96	--	SUMMONS (30) issued to federal party(s) federal defendant JOHN M. DEUTCH, federal defendant R. JAMES WOOLSEY, federal defendant ROBERT M. GATES, federal defendant DAVID – COHEN, federal defendant JACK DEVINE, federal defendant HUGH E. PRICE, federal defendant THOMAS A. TWEETEN, federal defendant JOHN GANNON, federal defendant DOUGLAS J. MACEACHIN, federal defendant JOHN L. HELGERSON, federal defendant TERRY WARD, federal defendant BRIAN LATELLE,

federal defendant RICHARD – COOPER, federal defendant CHRISTINE WILLIAMS, federal defendant JOSEPH S. NYE, federal defendant FRITZ ESMARTH, federal defendant DAN DONAHUE, federal defendant FREDERIC BRUGGER, federal defendant CIA, federal defendant WARREN CHRISTOPHER, federal defendant MARILYN MACAFEE, federal defendant ALEXANDER WATSON, federal defendant ANNE PATTERSON, federal defendant ANTHONY LAKE, federal defendant RICHARD FEINBERG, federal defendant NATL. SEC. COUNCIL, and non-parties: U.S. Attorney and U.S. Attorney General. (ted) [Entry date 03/08/96]

5/31/96 -- SUMMONS (25) issued to, and non-parties: U.S. Attorney and U.S. Attorney General. (jmf)

8/9/96 44 MOTION filed by federal defendant to dismiss complaint [1-1] (lkn) [Entry date 08/12/96]

8/30/96 51 MOTION filed by federal defendant ANTHONY LAKE, federal defendant RICHARD FEINBERG to dismiss complaint [1-1] (bjl) [Entry date 09/03/96]

8/30/96 55 MOTION filed by plaintiff JENNIFER K. HARBURY to create a viable alternative for service (lkn) [Entry date 03/03/96]

9/11/96 57 RESPONSE by federal defendant JOHN M. DEUTCH, federal defendant R. JAMES WOOLSEY, federal defendant ROBERT M. GATES, federal defendant DAVID COHEN,

federal defendant JACK DEVINE, federal defendant HUGH E. PRICE, federal defendant THOMAS A. TWEETEN, federal defendant JOHN GANNON, federal defendant DOUGLAS J. MACEACHIN, federal defendant JOHN L. HELGERSON, federal defendant TERRY WARD, federal defendant BRIAN LATELLE, federal defendant RICHARD COOPER, federal defendant CHRISTINE WILLIAMS, federal defendant JOSEPH S. NYE, federal defendant FRITZ ESMARTH, federal defendant DAN DONAHUE, federal defendant FREDERIC BRUGGER, federal defendant CIA, federal defendant WARREN CHRISTOPHER, federal defendant MARILYN MACAFEE, federal defendant ALEXANDER WATSON, federal defendant ANNE PATTERSON, federal defendant PEG WILLINGAM, federal defendant DOS, federal defendant ANTHONY LAKE, federal defendant RICHARD FEINBERG, federal defendant NATL. SEC. COUNCIL in opposition to motion to create a viable alternative for service [55-1] by JENNIFER K. HARBURY, and (second) motion to extend time within which defendants may be served in their individual capacities by forty-five (45) days [54-1] by JENNIFER K. HARBURY. (lkn) [Entry date 09/12/96]

9/13/96 58 ORDER by Judge Norma H. Johnson: granting motion to extend time within which defendants may be served in their individual capacities by forty-five (45) days [54-1] by JENNIFER K. HARBURY, plaintiff be, and hereby is, warned that that there shall be no further extensions of

time of service of the complaint, plaintiff shall file an amended complaint no later than 9/30/96; dispositive motions due by 11/15/96; response to dispositive motions due by 12/16/96; reply to dispositive motions due by 1/13/97; motion hearing on defendants' dispositive motions to be filed on 11/16/96 shall be set for 2:00 2/24/97; resolution of defendants' motion to dismiss complaint [1-1] [51-1] filed on 8/30/96 be and hereby is, stayed pending resolution of defendant's dispositive motion to be filed on 11/15/96. (N) (adc) [Entry date 09/16/96]

9/13/96 -- MEET AND CONFER STATUS HEARING held before Judge Norma H. Johnson: Current motion to dismiss can be withdrawn. Amended complaint is to be filed by 9/30/96. Motion to dismiss is to be filed by 11/15/96. Plaintiff's response to motion to dismiss due 12/16/96. Defendant's reply due 1/13/97. Motion hearing on defendant's motion to dismiss is set for 2/24/96 at 2:00 p.m. Oral request by plaintiff for 45 days in which to respond to motion to dismiss; heard and denied. Motion by plaintiff to extend time in which to serve defendants; heard and granted. Reporter: Gordon Slodysko (adc) [Entry date 09/17/96]

9/30/96 72 AMENDED COMPLAINT by plaintiff JENNIFER K. HARBURY amending complaint [1-1]; jury demand (lkn) [Entry date 10/01/96]

11/22/96 78 MOTION filed by federal defendant to dismiss amended complaint [72-1] (lkn) [Entry date 11/25/96]

12/23/9679 MOTION filed by plaintiff JENNIFER K. HARBURY for leave to file a brief in opposition to the defendants' motion to dismiss plaintiff's amended complaint in excess of the page limit: EXHIBIT (Memorandum in opposition). (lkn) [Entry date 12/24/96]

1/23/97 82 REPLY by federal defendant to plaintiff's opposition to motion to dismiss amended complaint [72-1] [78-1] by federal defendants (lkn) [Entry date 01/23/97]

3/10/97 83 ORDER by Judge Norma H. Johnson: denying motion to create a viable alternative for services [55-1] by JENNIFER K. HARBURY, denying motion to dismiss complaint [1-1] [44-1] by federal defendants (N) (adc) [Entry date 03/11/97]

4/4/97 84 MOTION OF FILING by federal defendants informing the Court that they will rely on additional authority. Simpkins v. District of Columbia, No 94-5243 at the hearing of 4/7/97; attachment (dam [Entry date 04/07/97]

4/7/97 -- STATUS HEARING before Judge Norma H. Johnson: motion hearing set for 4:00 4/23/97 Reporter: Gordon Slodysko (adc) [Entry date 04/10/97]

4/17/97 86 MEMORANDUM by plaintiff JENNIFER K. HARBURY filing additional authority; attachment (dam) [Entry date 04/18/97]

4/28/97 -- REASSESSMENT OF CIVIL CASE from Judge Norma Holloway Johnson to Judge

Colleen Kollar-Kotelly by direction of the Calendar Committee. Emergency matters will continue to be handled by Judge Johnson until Judge Kollar-Kotelly takes the oath of office. (N) (mlp) [Entry date 4/30/97]

3/30/98 88 MOTION filed by plaintiff JENNIFER K. HARBURY for leave to file second amended complaint; EXHIBIT (second amended complaint) (tlh) [Entry date 03/31/98]

4/10/98 89 RESPONSE by federal defendant in opposition to motion for leave to file second amended complaint [88-1] by JENNIFER K. HARBURY. (tlh) [Entry date 04/13/98]

7/20/98 90 ORDER by Judge Colleen Kollar-Kotelly: that by 8/3/98 plaintiff shall put forward specific nonconclusory factual allegations that establish improper motive animating the defendants' putative conspiracy with members of the Guatemalan military; no later than 8/17/98 defendants may file a supplemental brief in support of motion to dismiss the amended complaint; by 8/31/98 plaintiff may file a brief that responds to the defendants supplemental brief; the motions hearing scheduled for 8/3/98 shall be vacated (N) (adc)

8/3/98 91 FURTHER SUBMISSION OF FACTUAL ALLEGATIONS by plaintiff JENNIFER K. HARBURY; Exhibits (34). (lkn) [Entry date 08/04/98]

8/17/98 94 SUPPLEMENTAL by federal defendant in support of motion to dismiss amended complaint (tlh) [Entry date 08/18/98]

8/31/98 95 SUPPLEMENTAL BRIEF by plaintiff JENNIFER K. HARBURY in opposition to motion to dismiss amended complaint [72-1] [78-1] by federal defendants (tlh) [Entry date 09/01/98]

12/3/98 -- MOTION HEARING before Judge Colleen Kollar-Kotelly taken under advisement by federal defendant motion to dismiss amended complaint [72-1] [78-1] Reporter: Edward Hawkins (adc) [Entry date 12/04/98]

3/23/99 96 MEMORANDUM OPINION by Judge Colleen Kollar-Kotelly (N) (dot)

3/23/99 97 ORDER by Judge Colleen Kollar-Kotelly: granting in part, denying in part motion to dismiss amended complaint [72-1] [78-1]; that Counts 1-17 of the Seconded Amended Complaint shall be, and hereby are, dismissed with prejudice; that in all other respects, the defendants' motion to dismiss is denied; that by 4/5/99, the plaintiff shall file a more definite statement identifying the specific norms and provisions of international law on which she predicates the international-law claim in her Second Amended Complaint. (N) (dot)

4/19/99 101 RESPONSE RE: a more definite statement by plaintiff JENNIFER K. HARBURY to order [97-1] (tb) [Entry date 04/20/99]

7/20/99 103 MOTION filed by federal defendant for entry of final judgment (tb) [Entry date 07/21/99]

7/21/99 -- MEET AND CONFER STATUS HEARING before Judge Colleen Kollar-Kotelly: Status hearing set for 9:30 11/29/99. Motions due by 9/7/99. Response to motion due by 10/1/99. Reply to motion due by 10/15/99. Case assigned to the Complex track (track three). Reporter: Edward Hawkins (tb) [Entry date 07/22/99]

7/22/99 104 ORDER by Judge Colleen Kollar-Kotelly: dispositive motions due 9/7/99; response to dispositive motions due 10/1/99; reply to dispositive motions due 10/15/99; status hearing set for 9:30 11/29/99; response to motion for certification due 7/26/99; reply to motion due 7/30/99 (N) (adc)

7/26/99 105 RESPONSE by plaintiff JENNIFER K. HARBURY in opposition to motion for entry of final judgment [103-1] by federal defendants. (tb) [Entry date 07/27/99]

7/30/99 106 REPLY by federal defendants to plaintiff's opposition to motion for entry of final judgment [103-1] (jf) [Entry date 08/01/99]

8/4/99 107 MOTION filed by plaintiff JENNIFER K. HARBURY for leave to file third amended complaint; EXHIBIT (THIRD AMENDED COMPLAINT) (tb) [Entry date 08/05/99]

8/9/99 108 FINAL JUDGMENT by Judge Colleen Kollar-Kotelly in favor of the individual federal

defendants against plaintiff JENNIFER K. HARBURY (dam)

8/23/99 111 RESPONSE by federal defendant in opposition to motion for leave to file third amended complaint [107-1] by JENNIFER K. HARBURY. (lkn) [Entry date 08/24/99]

9/7/99 113 TRANSCRIPT filed for date(s) of December 03, 1998. Reporter: Edward N. Hawkins (jf) [Entry date 09/08/99]

9/7/99 116 NOTICE OF APPEAL by plaintiff JENNIFER K. HARBURY from order [114-1], entered on: September 10, 1999. $5.00 filing fee and $100.00 docketing fee paid. Copies mailed to Maureen F. Del Duca, Jodie L. Kelley, Robert C. Lawrence, Kimberly N. Tarver. (N) (jf) [Entry date 09/13/99]

9/10/99 115 MOTION filed by federal defendants to dismiss amended complaint [72-1] (tb) [Entry date 09/13/99]

9/13/99 -- TRANSMITTED PRELIMINARY RECORD on appeal [116-1] by JENNIFER K. HARBURY to U.S. Court of Appeals (jf)

9/15/99 -- USCA #99-5307 assigned for appeal [116-1] by JENNIFER K. HARBURY (tb) [Entry date 09/16/99]

10/14/99 117 RESPONSE by plaintiff JENNIFER K. HARBURY in opposition to motion to dismiss amended complaint [72-1] [115-1] by federal defendants. (tb) [Entry date 10/15/99]

11/8/99 122 REPLY by federal defendants to motion to dismiss amended complaint [72-1] [115-1] by federal defendants (tb) [Entry date 11/09/99]

2/9/00 123 ORDER by Judge Colleen Kollar-Kotelly: denying motion for leave to file third amended complaint [107-1] by JENNIFER K. HARBURY (N) (adc) [Entry date 02/11/00]

3/9/00 124 MEMORANDUM OPINION by Judge Colleen Kollar-Kotelly (N) (dot)

3/9/00 125 ORDER by Judge Colleen Kollar-Kotelly: granting in part, denying in part motion to dismiss amended complaint [72-1] [115-1], granting as to Counts 23-27, and denying as to Counts 18-22; plaintiff and defendants shall, no later than 3/24/00 at 5:00 p.m., file, fax or hand-deliver to opposing counsel, and hand-deliver directly to Chambers 4323, supplemental briefs addressing the following issue: Whether Plaintiff's international law claims against the Defendants present a nonjusticiable political question; that, no later than 3/31/00 at 5:00 p.m., the parties shall file, fax or hand-deliver to opposing counsel, and hand-deliver directly to Chambers 4323, response to the supplemental briefs. (N) (dot)

4/3/00 129 SUPPLEMENT BRIEF by plaintiff JENNIFER K. HARBURY to plaintiff's preliminary statement (bjsp) [Entry date 04/04/00]

4/3/00 130 MOTION (SUPPLEMENTAL) filed by federal defendants to dismiss amended complaint [72-1]; attachment (bjsp) [Entry date 04/04/00]

4/11/00 134 RESPONSE by federal defendant to supplemental memorandum [129-1] by JENNIFER K. HARBURY (jf) [Entry date 04/12/00]

4/13/00 145 RESPONSE by plaintiff JENNIFER K. HARBURY to motion to dismiss amended complaint [72-1] [130-1] by federal defendants (bjsp) [Entry date 09/20/00]

5/12/00 137 RESPONSE by plaintiff JENNIFER K. HARBURY in opposition to motion to dismiss amended complaint [72-1] [130-1] by federal defendants. (tb) [Entry date 05/15/00]

6/5/00 142 REPLY by federal defendant to plaintiff's opposition to motion to dismiss amended complaint [72-1] [130-1] by federal defendants. (dam) [Entry date 06/06/00]

6/27/00 -- STATUS HEARING before Judge Colleen Kollar-Kotelly: parties to submit a schedule to the Court by 6/30/00; Reporter: Edward Hawkins (dot) [Edit date 04/10/01]

11/6/00 146 MOTION filed by plaintiff JENNIFER K. HARBURY for order to compel defendants to respond to discovery; exhibits (8) (cdw) [Entry date 11/07/00]

12/8/00 149 RESPONSE by federal defendant in opposition to motion for order to compel defendants to

respond to discovery [146-1] by JENNIFER K. HARBURY; declaration (1), exhibit (1) (tb) [Entry date 12/13/00]

12/28/00 150 REPLY by plaintiff JENNIFER K. HARBURY in support of motion for order to compel defendants to respond to discovery [146-1] by JENNIFER K. HARBURY (hsj) [Entry date 12/29/00] [Edit date 01/03/01]

3/13/01 151 MEMORANDUM OPINION by Judge Colleen Kollar-Kotelly (N) (dam)

3/13/01 152 ORDER by Judge Colleen Kollar-Kotelly: denying motion to dismiss amended complaint [72-1] [130-1] by federal defendants, without prejudice. (N) (dam)

4/5/01 153 CERTIFIED COPY of docket sheet filed in USCA dated 12/12/00, on appeal [116-1], affirming the judgment of USDC. USCA #99-5307 (cjp) [Entry date 04/09/01]

5/22/01 154 ORDER by Judge Colleen Kollar-Kotelly: that defendants shall file supplemental briefing which addresses the issues referenced in the above paragraphs no later than 6/6/01. Plaintiff shall file her response to defendants' supplemental brief no later than 6/18/01. (N) (dot)

5/25/01 155 ORDER by Judge Colleen Kollar-Kotelly: that the classified declaration shall be identified on the docket sheet as an ex parte, sealed document filed by defendants on 5/21/01. The classified declaration shall be maintained under

seal, with access strictly limited to the Court and counsel for defendants. (N) (dot)

6/6/01 156 SUPPLEMENTAL MEMORANDUM by federal defendants in support of its opposition to plaintiff's motion to compel discovery [149-1] by federal defendants; attachment (1) (bm) [Entry date 06/07/01]

6/8/01 157 NOTICE OF FILING by federal defendants; declaration of William H. McNair (bm) [Entry date 06/11/01]

7/6/01 160 SUPPLEMENTAL MEMORANDUM by plaintiff JENNIFER K. HARBURY in support of motion for order to compel defendants to respond to discovery [146-1] by JENNIFER K. HARBURY; exhibits (3) (cdw) [Entry date 07/10/01]

8/28/01 161 MEMORANDUM OPINION by Judge Colleen Kollar-Kotelly (N) (dot)

8/28/01 162 ORDER by Judge Colleen Kollar-Kotelly: denying motion for order to compel defendants to respond to discovery [146-1] by JENNIFER K. HARBURY. That on or before 9/14/01, the parties shall file a joint status report with the Court setting forth the proposed future course of the litigation, including a proposed briefing schedule for any motions which may be appropriate at this time; thereafter, the Court shall set a status date. (N) (dot)

9/17/01 164 STATUS REPORT (JOINT) by plaintiff, federal defendants (cdw) [Entry date 09/18/01]

10/2/01 166 ORDER by Judge Colleen Kollar-Kotelly: plaintiff shall serve any discovery upon the IOB not later than 10/8/01. The government shall respond to the discovery request not later than 11/9/01. If appropriate, plaintiff shall file a motion to compel, motion due 12/10/01; response to motion due 1/7/02; reply motion due 1/28/02. (N) (dot)

GENERAL DOCKET
US COURT OF APPEALS FOR THE DC CIRCUIT
D.C. Circuit Court of Appeals

Court of Appeals Docket #: 99-5307 Filed 9/15/99
Nsuit: 2890 Other Statutory Actions
Harbury, Jennifer K. v. Deutch, John M., et al
Appeal from: U.S. District Court

9/15/99 CIVIL-US CASE docketed. Notice of Appeal filed by Appellant Jennifer K. Harbury. [463641-1] (sha)

9/17/99 CLERK'S ORDER filed directing Appellant to file [464233-1]: docketing statement; certificate of counsel; statement of issues; lower court decision; any procedural motions; transcript status notice; deferred appendix notice; appearance form due 10/18/99; any dispositive motions due 11/1/99. Directing Appellees to file [464233-2] certificate of counsel; any procedural motions; appearance form due 10/18/99; any dispositive motions due 11/1/99. [Entry Date: 9/17/99] (sha)

10/18/99 ENTRY OF APPEARANCE filed by Attorneys Jennifer M. Green, Beth Stephens, Jodie Lyn Kelley and Maureen Frances Del Duca for Appellant Jennifer K. Harbury [470582-1]. (jth)

10/18/99 INITIAL SUBMISSIONS filed by Appellant Jennifer K. Harbury [470588-1]: docketing statement; certificate of counsel; statement of issues; lower court decision; deferred appendix notice (Deferred Appendix needed = n). (jth)

10/18/99 NOTICE filed by Appellant Jennifer K. Harbury FINAL transcript status notice [470590-1]. Transcripts of the 12/3/98 hearing were received and filed in USDC on 9/7/99. Certificate of service date 10/18/99. (jth)

10/28/99 ENTRY OFAPPEARANCE filed by Attorneys R. Craig Lawrence and Wilma Antoinette Lewis for Appellees' John M. Deutch, et al. (Taken from the Certificate of Counsel and Motion for Leave to Late File submitted this date). [473325-1]. (jth)

11/15/99 MOTION filed (5 copies) by Appellees' John M. Deutch, et al., (certificate of service dated 11/15/99) for summary affirmance [477166-1]. Response due by 11/29/99. (jth)

11/18/99 CORRECTED MOTION filed by Appellees John M. Deutch, et al., (certificate of mail service dated 11/18/99) for summary affirmance [478111-1]. Response due 12/1/99. (jth)

12/1/99 OPPOSITION filed [480962-1] (5 copies) by Appellant Jennifer K. Harbury (certificate of service dated 12/1/99) to a motion for summary affirmance [478111-1]. (sha)

12/13/99 REPLY filed [483615-1] (5 copies) by Appellees John M. Deutch, et al. (certificate of service dated 12/13/99) to a response to the motion for summary affirmance [478111-1]. (sha)

2/8/00 PER CURIAM ORDER filed that the motion for summary affirmance be denied. The merits of the parties' positions are not so clear as to warrant summary action [478111-1]. Because the court has determined that summary disposition is not in order, the clerk is instructed to calendar this case for presentation to a merits panel. Before Judges Ginsburg, Sentelle, (No 3rd Judge). [Entry Date: 2/8/00] (wmw)

2/16/00 CLERK'S ORDER filed to schedule oral argument [496830-1] before Judge Initials: HTE DHG DST on 9/8/00 at 9:30 AM; Establishing the initial briefing schedule [496830-2]: Appellant's brief due on 5/17/00; Appellant's appendix due on 5/17/00; Appellees' brief due on 6/16/00; Appellant's reply brief due on 6/30/00. [Entry Date: 2/16/00] (cwc)

5/17/00 BRIEF filed by Appellant Jennifer K. Harbury [517926-1]. Copies: 16. Certificate of service date 5/17/00. (sha)

5/17/00 APPENDIX filed by Appellant Jennifer K. Harbury [517927-1]. Copies: 10. Certificate of service date 5/17/00. (sha)

6/16/00 BRIEF filed by Appellees John M. Deutch [524403-1]. Copies: 15. Certificate of service date 6/16/00. (sha)

6/30/00 REPLY BRIEF filed by Appellant Jennifer K. Harbury [527507-1]. Copies: 15. (Certificate of mail service date 6/30/00). (jth)

8/17/00	PER CURIAM ORDER filed to allocate oral argument times: APET minutes – 10 ERES minutes – 10. [537027-1], one counsel per side to argue. [537027-2] Oral argument scheduled for 9/8/00, Form 72 notice of attorney arguing case – [537027-3] due 8/25/00. [Entry Date: 8/17/00] (cwc)
9/8/00	ORAL ARGUMENT HELD before Edwards, Ginsburg, Tatel. (cco)
12/12/00	JUDGMENT for the reasons in the accompanying opinion affirming [562065-1] in part and reversing [562065-2] and remanding in part to the district court [562065-3]. Before Judges Edwards, Ginsburg, Tatel. [Entry Date 12/12/00] (mam)
12/12/00	OPINION (26 pgs) for the Court filed by Judge Tatel (mam)

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JENNIFER K. HARBURY, on her own behalf and as administratrix of the Estate of Efrain Bamaca-Velasquez,	)	Civil Action No. 96-0438 CMK
1010 Vermont Ave. N.W. Washington, D.C. 20005,	)	
Plaintiff,	)	SECOND AMENDED
v.	)	COMPLAINT FOR
JOHN M. DEUTCH, Director, Central Intelligence Agency ("CIA"); R. JAMES WOOLSEY, Director, CIA; ROBERT M. GATES, Director CIA; DAVID COHEN, Deputy Director for Operations, CIA; JOHN J. DEVINE, Deputy Director for Operations, CIA; THOMAS A. TWETTEN, Deputy Director for Operations, CIA; JOHN C. GANNON, Deputy Director for Intelligence, CIA; DOUGLAS J. MACEACHIN, Deputy Director for Intelligence, CIA; JOHN L. HELGERSON, Deputy Director for Intelligence, CIA; TERRY R. WARD, Chief, Latin America Division, CIA; BRIAN LATELLE National Intelligence Officer, Western Hemisphere, CIA;	)	DAMAGES AND INJUNCTIVE AND DECLARATORY RELIEF FOR VIOLATIONS OF THE FIRST, FIFTH AND NINTH AMENDMENTS TO THE U.S. CONSTITUTION; TORTS IN VIOLATION OF THE LAWS OF THE DISTRICT OF COLUMBIA AND THE COMMON-WEALTH OF VIRGINIA JURY TRIAL DEMANDED

RICHARD N. COOPER, Chief, National Intelligence Council, CIA; CHRISTINE N. WILLIAMS, Chief, National Intelligence Council, CIA, JOSEPH S. NYE, Chief, National Intelligence Council, CIA; FRITZ W. ESMARTH, Chief, National Intelligence Council, CIA; DAN DONAHUE, Guatemala Station Chief, CIA; FREDERICK A. BRUGGER, Guatemala Station Chief, CIA; UNNAMED EMPLOYEES OF THE CIA; each sued in his or her official and individual capacities; and the CENTRAL INTELLIGENCE AGENCY;

Central Intelligence Agency
Langley, Virginia

WARREN CHRISTOPHER, Secretary of State; MARILYN MACAFEE, U.S. Ambassador to Guatemala; ALEXANDER WATSON, Assistant Secretary of State for InterAmerican Affairs; ANNE PATTERSON; Deputy Assistant Secretary of State for InterAmerican Affairs, PEG WILLINGHAM, Guatemala Desk Officer, Department of State; UNNAMED EMPLOYEES OF THE U.S. DEPARTMENT OF STATE; each sued in his or her

official and individual capacities; the U.S. DEPARTMENT OF STATE;

Department of State
2201 C Street
Washington, D.C. 20520;

and

ANTHONY LAKE, National Security Advisor; RICHARD E. FEINBERG, staff member, National Security Council; UNNAMED EMPLOYEE OF THE NATIONAL SECURITY COUNCIL; each sued in his or her official and individual capacities; and the NATIONAL SECURITY COUNCIL;

National Security Council
The White House
1600 Pennsylvania Ave, NW
Washington, D.C. 20500;

Defendants.

SECOND AMENDED COMPLAINT FOR DAMAGES AND FOR INJUNCTIVE AND DECLARATORY RELIEF

Nature of the Case

1. This is a case about agents and officials of the United States who detained, tortured, and summarily

executed Efrain Bamaca-Velasquez, the husband of Plaintiff Jennifer Harbury and a member of the Guatemalan resistance movement, who then covering up the detention and torture while it occurred, and who continued to cover up the detention, torture and execution after Mr. Bamaca's death.

2. Many of the agents involved in the detention, torture and execution of Mr. Bamaca are also members of the Guatemalan military, trained in the use of torture and similar tactics by the United States government at its infamous "School of the Americas."

3. The agents and officials involved in directing these events, or in the ongoing cover-up of these events, include officials, employees and agents of the United States Central Intelligence Agency ("CIA"), the United States Department of State, and the National Security Council.

4. Plaintiff Jennifer K. Harbury brings this action for damages and equitable relief against agencies, officials, employees and agents of the United States government who directed, collaborated in, and participated in the abduction, secret detention, brutal torture, and extrajudicial execution of her husband, Efrain Bamaca-Velasquez; intentionally deceived Plaintiff as to her husband's true circumstances; and covered up their involvement therein.

5. Defendants' actions violated the First, Fifth and Ninth Amendments to the United States Constitution, norms of international law, and the laws of the District of Columbia and the Commonwealth of Virginia.

6. The constitutional and tort claims asserted herein fall into two broad categories. The first includes claims based on the direction of and participation in the secret detention, torture, and assassination of Mr. Bamaca by officials, employees and agents of the United States Central Intelligence Agency, the United States Department of State, and the National Security Council and on the adoption by such defendants of policies and practices that caused and encouraged said deception, torture, and assassination. The

second includes claims based on Defendants' intentional deception of Plaintiff as to her husband's true situation.

Jurisdiction and Venue

7. This Court has subject matter jurisdiction over the claims in this case pursuant to 28 U.S.C. §§ 1331, 1346, and 1350.

8. The U.S. District Court for the District of Columbia is the proper venue for this action pursuant to 28 U.S.C. § 1391.

The Parties

Plaintiff

9. Plaintiff Jennifer Kristina Harbury is a United States citizen, 44 years of age, and a resident of the District of Columbia. She is the widow of Efrain Bamaca-Velasquez.

The CIA Defendants

10. Defendant John M. Deutch is Director of the Central Intelligence Agency ("CIA"). He is sued in his official and individual capacities.

11. Defendant R. James Woolsey was Director of the CIA from 1993-1995. He is sued in his official and individual capacities.

12. Defendant Robert Gates was Director of the CIA from 1991-1993. He is sued in his official and individual capacities.

13. Defendants David Cohen, Jack DeVine, Hugh E. Price and Thomas Twetten were Deputy Directors for Operations of the CIA during times relevant to this Complaint. Each is sued in his official and individual capacities.

14. Defendants John Gannon, Douglas J. MacEachin and John L. Helgerson were Deputy Directors for Intelligence of the CIA during times relevant to this Complaint. Each is sued in his official and individual capacities.

15. Defendant Terry Ward was chief of the CIA's Latin America division during times relevant to the Complaint. He is sued in his official and individual capacities.

16. Defendant Brian Latelle was National Intelligence Officer for the Western Hemisphere of the CIA during times relevant to the Complaint. He is sued in his official and individual capacities.

17. Defendants Richard Cooper, Christine Williams, Joseph S. Nye and Fritz Esmarth were chiefs of the National Intelligence Council of the CIA during times relevant to this Complaint. Each is sued in his or her official and individual capacities.

18. Defendant Dan Donahue was the CIA station chief in Guatemala from 1991-1993. he is sued in his official and individual capacities.

19. Defendant Frederick Brugger was the CIA station chief in Guatemala from 1991-1993. He is sued in his official and individual capacities.

20. The unknown persons named as CIA Defendants are CIA employees who worked in Guatemala from March 1992 through March 1996, bore responsibility for the CIA's actions towards Mr. Bamaca or the Plaintiff, or were personally involved in the violation of their rights. Each is sued in his or her official and individual capacities.

21. The CIA is an agency of the United States government, responsible for collecting, correlating and disseminating national intelligence information.

<u>The Department of State Defendants</u>

22. Defendant Warren Christopher is Secretary of State. He is sued in his official and individual capacities.

23. Defendant Marilyn MacAffee was the U.S. Ambassador to Guatemala during all times relevant to this complaint. She is sued in her official and individual capacities.

24. Alexander Watson is Assistant Secretary for InterAmerican Affairs of the U.S. Department of State. He is sued in his official and individual capacities.

25. Defendant Anne Patterson was the Deputy Assistant Secretary of InterAmerican Affairs of the U.S. Department of State during times relevant to this Complaint. She is sued in her official and individual capacities.

25A. Defendant John R. Hamilton was the Deputy Assistant Secretary for InterAmerican Affairs (Caribbean and Central America) during times relevant to this Complaint. He is sued in his official and individual capacities.

26. Defendant Peg Willingham was the Guatemala Desk Officer for the Department of States during times relevant to this Complaint. She is sued in her official and individual capacities.

27. The unknown persons named as Department of State Defendants are Department of State employees who bore responsibility for the Department of State's actions towards Mr. Bamaca or Ms. Harbury or were personally involved in the violation of their rights. Each is sued in his or her official and individual capacities.

28. The Department of State is an agency of the United States, responsible for the management of foreign affairs.

The National Security Council Defendants

29. Anthony Lake is President Clinton's National Security Advisor and head of the National Security Council. He is sued in his official and individual capacities.

30. Richard Feinberg is a staff member of the National Security Council. He is sued in his official and individual capacities.

31. The unknown persons named as National Security Council Defendants are employees of that agency who bore responsibility for the agency's actions towards Mr. Bamaca or Ms. Harbury or were personally involved in the violation of their rights. Each is sued in his or her official and individual capacities.

32. The National Security Council is an independent agency within the Executive Office of the President of the United States, responsible for advising the President with respect to national security policies.

Statement of Facts

33. Plaintiff Jennifer K. Harbury is the widow of Efrain Bamaca-Velasquez, a Mayan citizen of Guatemala who was long involved in the thirty-five year civil war in that country. Mr. Bamaca, a high-ranking commander of the Guatemalan National Revolutionary Union ("U.R.N.G.") resistance forces, also was known as Commander Everardo.

A. The Defendants' Direction of, and Participation in, the Secret Imprisonment, Torture and Extrajudicial Execution of Efrain Bamaca Velasquez

34. On or about March 12, 1992 Mr. Bamaca vanished in Guatemala. The Guatemalan army publicly claimed that he had committed suicide during an army

skirmish with U.R.N.G. forces and that it had buried his body in the nearby town of Retalhuleu.

35. On March 18, 1992, the CIA reported to the White House and the Department of State, as well as other U.S. agencies, that Commander Everardo had in fact been captured alive by Guatemalan military forces and that they would probably fabricate his combat death in order to be able to maximize their ability to extract information from Mr. Bamaca.

36. On information and belief, after his capture on March 18, 1992, Mr. Bamaca was secretly detained, psychologically abused and physically tortured by CIA agents and the Guatemalan army for approximately one year, and eventually executed without trial.

37. On information and belief, CIA agents and the Guatemalan army routinely imprison anti-government activists in secret detention under severe psychological abuse and subject them to torture in order to extract information from them. On information and belief, these prisoners are routinely extrajudicially executed.

38. On information and belief, the Defendants were aware of the Guatemalan army's use of this open and notorious widespread practice.

39. On information and belief, the Defendants also assisted in the initiation and perpetuation of this open and notorious widespread practice by training Latin American military and police officers to engage in such practices at the School of the Americas, a United States government facility located in Georgia that was established in 1946.

40. On information and belief, Julio Roberto Alpirez, a Colonel in the Guatemalan army, Mr. Sosa-Orellana, a Major in the Guatemalan army, and other Guatemalan military officers responsible for the arrest, secret imprisonment, torture, and extrajudicial execution of Mr. Bamaca had previously been students at the School of the

Americas and had received additional United States military training.

41. On information and belief, many of the Guatemalan military officers involved in the arrest, secret detention, torture, and extrajudicial execution of Mr. Bamaca, including Mr. Alpirez Mr. Sosa, also were paid CIA agents.

42. On information and belief, these paid CIA agents, called "assets" by the CIA, relayed information to their superiors at the CIA about the condition, abuse and fate of Mr. Bamaca, who was considered to be a highly important prisoner both by the Defendants and by the Guatemalan military.

43. On information and belief, these paid CIA agents were hired by the CIA for the purpose of, among other things, obtaining information about the URNG. On information and belief it is understood by the CIA and/or intended by the CIA that this information would be obtained through torture and similar means.

44. On information and belief, such information was shared with the White House and the Department of State.

45. Despite full knowledge of this situation, none of the Defendants took any steps to stop this conduct; none directed their agents to stop this conduct; and none took any other measures to intervene to halt such unlawful abuse.

46. Instead, on information and belief, Defendants knowingly paid substantial sums to the CIA's Guatemalan agents or "assets" who secretly imprisoned, tortured and extrajudicially murdered Mr. Bamaca in order to obtain information from Mr. Bamaca that was sought by the CIA.

47. Indeed, on information and belief, the CIA paid Mr. Alpirez $44,000 in July, 1992, and Mr. Alpirez was observed engaging in the torture of Mr. Bamaca during this very same month.

48. On information and belief, Mr. Bamaca was executed without trial pursuant to the orders of Mr. Alpirez and/or other paid agents and/or employees of the CIA.

49. The defendants thus knowingly engaged in, directed, collaborated and conspired in, and otherwise contributed to the secret imprisonment, torture and extrajudicial murder of, Efrain Bamaca-Velasquez.

B. The Defendants' Deception of Jennifer Harbury as to her Husband's True Circumstances Prior to Her Husband's Extrajudicial Execution

50. In early 1993, Plaintiff was informed by an eyewitness that her husband had not died in combat, but was in fact alive and being subjected to torture by CIA agents and members of the Guatemalan army.

51. The eyewitness, Santiago Cabrera Lopez, informed Plaintiff that he possessed this information because he himself had been captured, secretly detained and tortured by members of the Guatemalan army and that, during this period, he had directly witnessed Mr. Bamaca – his own former commander – being physically and psychologically tortured and/or abused on several occasions.

52. At that time, Mr. Lopez also told Plaintiff that the sessions he had observed included a July, 1992 session in which Mr. Alpirez personally engaged in the torture of Mr. Bamaca.

53. At that time, Mr. Lopez also provided Plaintiff with the names of approximately forty other people who were being secretly detained by CIA agents and members of the Guatemalan military.

54. Mr. Lopez transmitted this information to the Plaintiff orally and through a written statement.

55. In March, 1993, Plaintiff contacted several Department of State officials, told them of her concerns, asked them if they had any information about her husband's status, and provided them with Mr. Lopez's statement. The Department of State officials promised to look into the matter and to assist her.

56. On information and belief, Defendants were aware before Mr. Bamaca's capture that URNG members were being imprisoned by CIA agents and/or other members of the Guatemalan military. On information and belief, reports written at least as early as May, 1993 and distributed to CIA, Department of State, White House and National Security Counsel officials indicated that three Guatemalan military officers had confirmed that as many as 340-360 former U.R.N.G. members were being imprisoned by CIA agents and/or other members of the Guatemalan military, and at least one of these reports affirmatively stated that Mr. Bamaca was still alive.

57. On information and belief, other substantial evidence and documentation concerning the fate of Mr. Bamaca was possessed by and/or readily available and accessible to all Defendants both before and after this time.

58. None of this information, however, was relayed to Plaintiff.

59. Despite the availability of this information, Department of State letters publicly distributed throughout 1993 and 1994 repeatedly stated that no independent information existed as to the secret detention of Guatemalan citizens, and that the Department of State was highly concerned about Mr. Bamaca's status.

60. In August 1993, Plaintiff received permission to open the Retalhuleu grave where the Guatemalan army had claimed to have buried Bamaca, and discovered that it did not contain the remains of her husband but instead contained the body of a young man who was far smaller and younger than her husband, and who had completely different dental patterns.

61. Plaintiff immediately reported this information to defendant Marilyn MacAffee, then the United States Ambassador to Guatemala.

62. Defendant MacAffee asked that the information be submitted in writing and stated that she would investigate

the matter immediately and report her findings to the Plaintiff. Defendant MacAffee also assured Plaintiff that she would be properly informed regarding her husband's situation.

63. Plaintiff submitted the requested information within a week.

64. In September 1993, because neither Defendant MacAffee nor any other official of the United States government had provided her with any relevant information, Plaintiff engaged in a highly dangerous week-long hunger strike in front of the Politecnica, a military center located in Guatemala City, in protest of her husband's situation, and to insist that he be presented to the courts and given a fair trial, and that his rights under the Geneva Convention be protected.

65. State Department Defendants were fully aware of Plaintiff's hunger strike and communicated with her regularly before, during and after the hunger strike.

66. On information and belief, the Defense Intelligence Agency ("DIA") reported in September, 1993 to the White House, the Secretary of State, and the United States Embassy in Guatemala that stated that Mr. Bamaca had been captured alive, interrogated, and executed.

67. On information and belief, prior to Mr. Bamaca's extrajudicial execution Defendants intentionally misled Plaintiff, through their deceptive statements and omissions, into believing that concrete information about her husband's fate did not exist because they did not want to threaten their ability to obtain information from Mr. Bamaca through his detention and torture. On information and belief, Defendants feared that any such ability would be threatened if Plaintiff or anyone else learned of Mr. Bamaca's detention and torture.

68. On information and belief, Defendants also intentionally misled Plaintiff, through their deceptive statements and omissions, into believing that concrete information about her husband's death did not exist because they did not want their role or the role of any U.S. official,

employee or agent in Mr. Bamaca's secret imprisonment, torture and extrajudicial execution to be revealed. On information and belief, Defendants feared that such information would be revealed if they disclosed to Plaintiff or to anyone else that they had information regarding Mr. Bamaca's fate, and they could then be subject to public embarrassment, censure, and/or legal liability.

69. Internal memoranda distributed by and/or received by defendants during the relevant time period demonstrates the defendants intent to keep the involvement of the U.S. Government in the detention, torture, and execution of Mr. Bamaca out of the public eye.

C. The Defendants' Deception of Jennifer Harbury as to her Husband's True Circumstances After Her Husband's Extrajudicial Execution

70. From October, 1993 to October, 1994, Plaintiff met repeatedly with the Department of State Defendants to seek information as to the fate of her husband.

71. During this time period, the Department of State Defendants repeatedly informed Plaintiff that they were highly concerned about her husband's situation, were looking seriously into the matter, and had made repeated inquires to the Guatemalan army on the matter but had been told that the military did not have Mr. Bamaca, and had never had him.

72. At no time was Plaintiff informed by any of the Defendants or by anyone else that any reports as to the fate of her husband existed, nor was she advised of the underlying contents of such reports.

73. Nor was Plaintiff informed that CIA agents and military sources had confirmed to the United States government that they were, in fact, secretly detaining numerous Guatemalan citizens and torturing and extrajudicially executing them. To the contrary, form letters

distributed by the Department of State indicated that there was no independent evidence of any such practices.

74. Numerous human rights activists and Congressional staffers also made inquires on Plaintiff's behalf. None of them was advised of the existence of any such information or documents, nor of their underlying contents.

75. Based on the overall context, together with the intentional deceptive statements and omissions made by the Defendants, their demeanor, their actions, and their communications to others, Plaintiff understood, as would any reasonable person, that no such concrete information existed as to her husband's fate and that Defendants were making all possible efforts to determine his fate.

76. Defendants were aware of Plaintiff's understanding, intentionally created such understanding through their deceptive statements and omissions, and intended for her to continue with such understanding and to rely on that belief to cease her inquires into the matter.

77. Defendants at no time informed Plaintiff that they were unwilling to investigate her case or to give her information about her husband's situation. Instead, a decision was made to neither share the information with her, nor inform her of the existence of such information.

78. As a direct result of Defendants' intentionally deceptive statements and omissions, Plaintiff engaged in a highly publicized 32-day hunger strike in front of the National Palace in Guatemala City in a desperate effort to save her husband's life. The hunger strike lasted for the entire month of October 1994.

79. Plaintiff engaged in her hunger strike on the assumption that her husband might still be alive, and in the hope that her strike would induce his captors to free him. Plaintiff would not have commenced, or continued her hunger strike, had she been credibly informed that her husband was dead, a fact Plaintiff communicated to State Department officials.

80. The State Department Defendants were fully aware of Plaintiff's hunger strike, and were in direct and indirect personal communication with her before, during and after the hunger strike.

81. After nearly thirty days on this hunger strike, Plaintiff was informed by Mike Wallace, a reporter who appears on the "60 Minutes" television program, that the United States Embassy in Guatemala in fact possessed a concrete intelligence report confirming that her husband had been captured alive.

82. The Department of State then issued an official statement confirming that Mr. Bamaca was captured alive, was lightly but not seriously wounded, and was a prisoner for some time, but that no information existed to confirm that he was still alive.

83. Plaintiff returned to Washington, D.C. in November, 1994, and met with the National Security Council Defendants. Defendant Anthony Lake informed Plaintiff that the government had "scraped the bottom of the barrel" for information, and that no further information existed. He also stated that they were still searching for information and would keep Plaintiff informed.

84. On information and belief, however, the National Security Council was in possession of the September, 1993 report issued by the CIA that verified that Mr. Bamaca had been extrajudicially executed while in custody. On information and belief, the National Security Council also had full access to numerous other reports that stated that Mr. Bamaca was in fact long dead. The National Security Council Defendants, however, never informed or advised Plaintiff of the existence of any such reports of her husband's death, nor of the underlying contents thereof.

85. Because Plaintiff suspected that information was still being improperly withheld from her, she filed Freedom of Information Act ("FOIA") requests with the Defendants' respective agencies in January 1995. Although expedited

processing was granted in light of the emergency situation, Plaintiff received no documents of any kind in the following months.

86. From November 1994 through February of 1995, Plaintiff met repeatedly with the State Department and National Security Council Defendants. They repeatedly informed her that no information existed to show that her husband was alive. When she asked point blank if any concrete information existed as to his death, such as a body, witness, grave, credible report, or anything else of any kind, she was told that no such concrete information existed, and that they would assume he was alive for purposes of their investigation.

87. In mid-February 1995, Plaintiff announced publicly, as well as personally to the State Department and National Security Council Defendants, that, due to the failure of the Defendants to inform her of her husband's fate or to assist her in her attempts to save her husband's life or at least determine his fate, she would resume her hunger strike in front of the White House on March 12, 1995, the third anniversary of her husband's capture.

88. All Defendants were fully aware of Plaintiff's hunger strike and that Plaintiff would cease her hunger strike if she were fully apprised of information concerning her husband's death or continued detention.

89. In response, the National Security Council and Department of State Defendants each met with Plaintiff again. They each told her that they were of the opinion (or assessment) that her husband was dead. When Plaintiff pressed for the basis of this opinion or assessment, she was told that a thorough investigation had been carried out, that there was no evidence that her husband remained alive, that many years had now passed, that they did not know what had happened to him, and that they would continue to assume that he was alive for purposes of the investigation.

90. As a result of Defendants' intentionally deceptive statements and omissions, Plaintiff continued to believe that it was possible that her husband remained alive and was suffering terrible torture. This belief caused Plaintiff severe emotional injury, and led her to engage in a third, very dangerous hunger strike that began on March 12, 1995.

91. On the twelfth day of this hunger strike, United States Representative Robert Torricelli publicly announced that the murder of Mr. Bamaca had been ordered in 1992 by Julio Roberto Alpirez, a paid CIA agent and a Colonel in the Guatemalan army.

92. On information and belief, after Mr. Bamaca's extrajudicial execution Defendants intentionally misled Plaintiff, through their deceptive statements and omissions, into believing that concrete information about her husband's fate did not exist because they did not want their role or the role of any of the other Defendants in Mr. Bamaca's secret imprisonment, torture and extrajudicial execution to be revealed. On information and belief, Defendants feared such information could be revealed if they disclosed to Plaintiff or to anyone else that they had information regarding Mr. Bamaca's fate.

D. The Injuries Suffered by Plaintiff Directly Resulted from Defendants' Action and from Long-Standing Policies and Practices of the Defendant Agencies

93. Defendant CIA has a long-standing policy, pattern or practice of extracting information through severe torture that often results in death, and of purchasing information that the CIA knows is being extracted through torture and the threat of extrajudicial execution.

94. Defendant CIA also has a long-standing policy, pattern or practice of failing to consider allegations of human rights abuses when recruiting and maintaining assets.

95. Mr. Bamaca's secret imprisonment, torture and extrajudicial execution was directly caused by these CIA policies, patterns or practices.

96. Because Plaintiff still has in-laws in Guatemala and wishes to someday return to live in Guatemala, she and her family members are at risk of suffering similar harms in the future from these CIA policies, patterns or practices.

97. Defendants the Department of State and the National Security Council have a long-standing policy, pattern or practice of providing false information, through deceptive statements and intentional omissions, as to the fate of anyone injured or killed through the CIA's long-standing policy, pattern or practices related to the extraction of information.

98. As a result of the fraudulent statements and intentional omissions made by the Department of State and the National Security Council Defendants, including but not limited to the failure to inform Plaintiff of the March, 1992 report that her husband might still be alive, Plaintiff was unable to take appropriate actions to save her husband's life. Specifically, Plaintiff was foreclosed from effectively seeking adequate legal redress, petitioning the appropriate government authorities, and seeking to publicize her husband's true plight through the media.

99. As a further result of the deceptive statements and intentional omissions made to her by the Department of State and National Security Council Defendants, including but not limited to their failure to inform Plaintiff of the numerous and concrete reports that her husband was dead, Plaintiff was prevented from making important decisions related to the conduct of her family life. Specifically, Plaintiff was foreclosed from making appropriate arrangements for her husband's burial and she was foreclosed from making other decisions related to the future conduct of her family life.

100. As a result of the fraudulent statements and intentional omissions made to her by the Department of State

and National Security Council Defendarts, Plaintiff suffered severe physical and emotional distress, and economic injuries.

101. Although she did ultimately receive some information from the Defendant agencies as a result of her FOIA requests, to this day Plaintiff still does not know when, where or how her husband died and she has been unable to retrieve his remains for a proper burial.

102. Some or all of the actions, statements, omissions and policies complained of were directed by U.S. Government agents, officials or employees located in the United States.

Causes of Action

I. Violations of Efrain Bamaca's Rights under the Fifth Amendment of the United States Constitution

A. Claims For Declaratory and Injunctive Relief against Defendant CIA and Each of the Individual CIA Defendants Named in His or Her Official Capacity.

Count 1

103. Plaintiff incorporates by reference the allegations in paragraphs 1 through 102.

104. Defendant CIA maintains a policy, pattern or practice of extracting information through the imprisonment and/or severe torture of individuals who may possess information that the CIA, CIA officials, CIA employees and/or CIA agents may deem valuable that often results in their death.

105. The CIA Defendants adhered to this policy, pattern or practice when they imprisoned, tortured and/or extrajudicially executed Mr. Bamaca.

106. By imprisoning, torturing and/or extrajudicially executing Mr. Bamaca, the CIA Defendants deprived Mr.

Bamaca of his life and his liberty in violation of the substantive and procedural protections of the Due Process Clause of the Fifth Amendment.

Count 2

107. Plaintiff incorporates by reference the allegations set forth in paragraphs 1 through 106.

108. Defendant CIA maintains a policy, pattern or practice of purchasing information that its officials, employees and/or agents know or should know is being extracted through the secret imprisonment, torture, and threat of extrajudicial execution of individuals who may possess information that the CIA, CIA officials, CIA employees and/or CIA agents may deem valuable.

109. The CIA Defendants adhered to this policy, pattern or practice when they conspired with and/or directed Julio Roberto Alpirez and/or others who intentionally and secretly imprisoned, tortured and/or extrajudicially executed Mr. Bamaca as part of their effort to obtain information sought by the CIA defendants.

110. The CIA Defendants knew or should have known that Mr. Alpirez and/or others from whom they were seeking to purchase this information would resort to such methods to obtain the information both because the CIA Defendants had trained Mr. Alpirez and/or others to use such methods at the CIA's School of Americas and because the CIA Defendants were aware that such methods were regularly employed by Mr. Alpirez and other members of the Guatemalan military.

111. By conspiring with and/or directing Julio Roberto Alpirez and/or others who intentionally and secretly imprisoned, tortured and/or extrajudicially executed Mr. Bamaca, the CIA Defendants deprived Mr. Bamaca of his life and his liberty in violation of the substantive and procedural

protections of the Due Process Clause of the Fifth Amendment.

Count 3

112. Plaintiff incorporates by reference the allegations set forth in paragraphs 1 through 111.

113. Defendant CIA maintains a policy, pattern or practice of extracting information through the imprisonment and/or severe torture of individuals who may possess information that the CIA, CIA officials, CIA employees, and/or CIA agents may deem valuable that often results in their death.

114. Defendant CIA also maintains a policy, pattern or practice of purchasing information that its officials, employees and/or agents know or should know is being extracted through the secret imprisonment, torture, and threat of extrajudicial execution of individuals who may possess information that the CIA, CIA officials, CIA employees and/or CIA agents may deem valuable.

115. Defendant CIA also maintains a policy, pattern or practice of hiring and maintaining agents and assets without due regard for such agents' and assets' commission of human rights abuses.

116. By maintaining such policies, patterns or practices, the CIA Defendants exhibited deliberate and reckless indifference to the life and liberty of individuals with whom they or those whom they employ and/or from whom they purchase information would come into contact, thereby encouraging and causing the detention, torture and extrajudicial execution of Mr. Bamaca, in violation of the substantive and procedural protections of the Due Process Clause of the Fifth Amendment.

B. Bivens Damages Claims Against Each of the CIA Defendants Who is Named in His or Her Individual Capacity.

Count 4

117. Plaintiff incorporates by reference the allegations in paragraphs 1 through 116.

118. Mr. Bamaca has a clearly established right to be free from being denied his life and his liberty in violation of the substantive and procedural protections of the Due Process Clause of the Fifth Amendment by being secretly imprisoned, tortured, and/or extrajudicially executed.

119. By intentionally and secretly imprisoning, torturing and extrajudicially executing Mr. Bamaca, the CIA Defendants deprived Mr. Bamaca of his life and his liberty in violation of the substantive and procedural protections of the Due Process Clause of the Fifth Amendment.

120. The CIA Defendants' acts were intentional, wilful and malicious.

Count 5

121. Plaintiff incorporates by reference the allegations set forth in paragraphs 1 through 120.

122. Mr. Bamaca has a clearly established right to be free from being denied his life and his liberty in violation of the substantive and procedural protections of the Due Process Clause of the Fifth Amendment by being secretly imprisoned, tortured, and/or extrajudicially executed.

123. By conspiring with and/or directing Julio Roberto Alpirez and/or others who intentionally and secretly imprisoned, tortured and extrajudicially executed Mr. Bamaca, the CIA Defendants deprived Mr. Bamaca of his life and his liberty in violation of the substantive and procedural

protections of the Due Process Clause of the Fifth Amendment.

124. The CIA Defendants' acts were intentional, wilful and malicious.

II. Violations of Plaintiff's Right to Familial Integrity that is Protected by the First, Fifth and Ninth Amendments of the United States Constitution

A. Claims for Declaratory and Injunctive Relief Against the Agency Defendants and the Individual Defendants in their Official Capacities

Count 6
(Against the CIA Defendants)

125. Plaintiff incorporates by reference the allegations in paragraphs 1 through 124.

126. Defendant CIA maintains a policy, pattern or practice of extracting information through the imprisonment and/or severe torture of individuals who may possess information that the CIA, CIA officials, CIA employees and/or CIA agents may deem valuable that often results in their death.

127. The CIA Defendants adhered to this policy, pattern or practice when they intentionally and secretly imprisoned, tortured and/or extrajudicially executed Mr. Bamaca.

128. By intentionally and secretly imprisoning, torturing and/or extrajudicially executing Mr. Bamaca, the CIA Defendants deprived Plaintiff of her rights protected by the First, Fifth and Ninth Amendments to associate with, to enjoy the company of, to communicate with, and to make familial decisions related to, her husband, and to attend to his health, well-being and security.

129. This conduct caused Plaintiff extreme emotional, physical, and economic harm.

Count 7
(Against the CIA Defendants)

130. Plaintiff incorporates by reference the allegations set forth in paragraphs 1 through 129.

131. Defendant CIA maintains a policy, pattern or practice of purchasing information that its officials, employees and/or agents know or should know is being extracted through the secret imprisonment, torture, and threat of extrajudicial execution of individuals who may possess information that the CIA, CIA officials, CIA employees and/or CIA agents may deem valuable.

132. The CIA Defendants adhered to this policy, pattern or practice when they conspired with and/or directed Julio Roberto Alpirez and/or others who intentionally and secretly imprisoned, tortured and/or extrajudicially executed Mr. Bamaca as part of their effort to obtain information sought by the CIA defendants.

133. The CIA Defendants knew or should have known that Mr. Alpirez and/or others from whom they were seeking to purchase this information would resort to such methods to obtain the information both because the CIA Defendants had trained Mr. Alpirez and/or others to use such methods at the CIA's School of the Americas and because the CIA Defendants were aware that such methods were regularly employed by Mr. Alpirez and other members of the Guatemalan military.

134. By conspiring with and/or directing Julio Roberto Alpirez and/or others who intentionally and secretly imprisoned, tortured and/or extrajudicially executed Mr. Bamaca, the CIA Defendants deprived Plaintiff of her rights protected by the First, Fifth and Ninth Amendments to associate with, to enjoy the company of, to communicate

with, and to make familial decisions related to, her husband, and to attend to his health, well-being and security.

135. This conduct caused Plaintiff severe emotional, physical, and economic harm.

Count 8
(Against the Department of State and
National Security Council Defendants)

136. Plaintiff incorporates by reference the allegations in paragraphs 1 through 135.

137. Defendants the Department of State and the National Security Council have a long-standing policy, pattern or practice of providing false information, through fraudulent statements and intentional omissions, as to the fate of anyone injured or killed through the CIA's long-standing policy, pattern or practice related to the extraction of information.

138. The Department of State and National Security Council Defendants adhered to this policy, pattern or practice when they provided Plaintiff with deceptive or false information related to her husband and otherwise concealed whether he was alive when in fact he was alive.

139. By providing such deceptive or false information and by otherwise concealing information related to Mr. Bamaca's true situation, including, but not limited to, the May 1993 report that he was still alive, the Department of State and National Security Council Defendants deprived Plaintiff of her rights protected by the First, Fifth and Ninth Amendments to associate with, to enjoy the company of, to communicate with, and to make familial decisions related to, her husband, and to attend to his health, well-being and security.

140. This deceptive or false information and concealment prevented Plaintiff from preventing her husband's execution and attaining his release because it foreclosed her from effectively seeking adequate legal redress,

petitioning the appropriate government authorities, and seeking to publicize her husband's plight through the media.

141. This deceptive or false information and concealment also caused Plaintiff extreme emotional, physical and economic harm.

Count 9
(Against the Department of State and
National Security Council Defendants)

142. Plaintiff incorporates by reference the allegations in paragraphs 1 through 141.

143. Defendants the Department of State and the National Security Council have a long-standing policy, pattern or practice of providing false information, through fraudulent statements and intentional omissions, as to the fate of anyone injured or killed through the CIA's long-standing policy, pattern or practices related to the extraction of information.

144. The Department of State and National Security Council Defendants adhered to this policy, pattern or practice when they provided Plaintiff with false information, through fraudulent statements and intentional omissions, related to her husband and otherwise concealed whether he was alive when in fact he was alive.

145. By providing such false information and by otherwise concealing information regarding Mr. Bamaca's true situation, including, but not limited to, the later reports of his death, the Department of State and National Security Council Defendants deprived Plaintiff of her rights protected by the First, Fifth and Ninth Amendments to associate with, to enjoy the company of, to communicate with, and to make familial decisions related to, her husband, and to attend to his health, well-being and security, and other needs.

146. This false information and concealment prevented Plaintiff from making important decisions related to the conduct of her family life including, but not limited to,

making appropriate arrangements for her husband's burial and making other decisions related to the future conduct of her family life.

147. This false information and concealment also caused Plaintiff extreme emotional, physical and economic harm.

B. Bivens Damages Claims Against the Individual Defendants who are Named in their Individual Capacities.

Count 10
(Against the Individual CIA Defendants)

148. Plaintiff incorporates by reference the allegations in paragraphs 1 through 147.

149. By intentionally and secretly imprisoning, torturing and extrajudicially executing Mr. Bamaca, the CIA Defendants deprived Plaintiff of her clearly established rights protected by the First, Fifth and Ninth Amendments to associate with, to enjoy the company of, to communicate with, and to make familial decisions related to, her husband, and to attend to his health, well-being and security.

150. The CIA Defendants' acts were intentional, wilful and malicious.

151. This conduct caused Plaintiff severe emotional, physical, and economic harm.

Count 11
(Against the Individual CIA Defendants)

152. Plaintiff incorporates by reference the allegations set forth in paragraphs 1 through 151.

153. By conspiring with and/or directing Julio Roberto Alpirez and/or others who intentionally and secretly imprisoned, tortured and extrajudicially executed Mr.

Bamaca, the CIA Defendants deprived Plaintiff of her clearly established rights protected by the First, Fifth and Ninth Amendments to associate with, to enjoy the company of, and to communicate with, her husband, and to attend to his health, well-being and security.

154. The CIA Defendants' acts were intentional, wilful and malicious.

155. This conduct caused Plaintiff severe emotional, physical, and economic harm.

Count 12
(Against the Individual Department of State and National Security Council Defendants)

156. Plaintiff incorporates by reference the allegations in paragraphs 1 through 155.

157. By providing Plaintiff with false or deceptive information related to her husband and otherwise concealing whether he was alive when he was alive, including, but not limited to, concealment of the 1993 report that he might still be alive, the Department of State and National Security Council Defendants deprived Plaintiff of her clearly established rights protected by the First, Fifth and Ninth Amendments to associate with, to enjoy the company of, and to communicate with, her husband, and to attend to his health, well-being and security.

158. This false and deceptive information and concealment prevented Plaintiff from preventing her husband's execution and attaining his release because it foreclosed her from effectively seeking adequate legal redress, petitioning the appropriate government authorities, and seeking to publicize her husband's plight through the media.

159. The Department of State and National Security Council Defendants' acts were intentional, wilful and malicious.

160. This false and deceptive information and concealment also caused Plaintiff extreme emotional, physical and economic harm.

Count 13
(Against the Individual Department of State and National Security Council Defendants)

161. Plaintiff incorporates by reference the allegations in paragraphs 1 through 160.

162. By providing Plaintiff with false and deceptive information related to her husband and otherwise concealing whether or not he was alive when he was not alive, including but not limited to numerous later reports of his death, the Department of State and National Security Council Defendants deprived Plaintiff of her clearly established rights protected by the First, Fifth and Ninth Amendments to associate with, to enjoy the company of, and to communicate with, her husband, and to attend to his health, well-being and security, and other needs.

163. This false and deceptive information and concealment prevented Plaintiff from making important decisions related to the conduct of her family life including, but not limited to, making appropriate arrangements for her husband's burial and making other decisions related to the future conduct of her family life.

164. The Department of State and National Security Council Defendants' acts were intentional, wilful and malicious.

165. This false and deceptive information and concealment also caused Plaintiff extreme emotional, physical and economic harm.

III. Violations of Plaintiff's Right to Meaningful Access to the Courts that is Protected by the First and Fifth Amendments of the United States Constitution

A. Claim for Declaratory and Injunctive Relief Against Defendants the Department of State and the National Security Council and each of the individual Department of State and National Security Council Defendants who is Named in his or her Official Capacity.

Count 14

166. Plaintiff incorporates by reference the allegations in paragraphs 1 through 165.

167. Defendants the Department of State and the National Security Council have a long-standing policy, pattern or practice of providing false information, through fraudulent statements and intentional omissions, as to the fate of anyone injured or killed through the CIA's long-standing policy, pattern or practices related to the extraction of information.

168. The Department of State and National Security Council Defendants adhered to this policy, pattern or practice when they provided Plaintiff with false and deceptive information related to her husband and otherwise concealed her husband's true situation.

169. By providing such intentionally deceptive or fraudulent statements and omissions, the Department of State and National Security Council Defendants deprived Plaintiff of her right protected by the First and Fifth Amendments to adequate, effective and meaningful access to the courts.

170. This false or deceptive information and concealment foreclosed Plaintiff from effectively seeking adequate legal redress.

171. The Department of State and National Security Council Defendants intentionally misled Plaintiff in this manner because, while he was still alive, they did not want to threaten their ability to obtain information from Mr. Bamaca through his detention and torture, and because, at all times, they did not want their role or the role of any of the other Defendants in Mr. Bamaca's secret imprisonment, torture and extrajudicial execution to be revealed. The Department of State and National Security Council Defendants feared that, if Plaintiff sought legal redress, these objectives would be undermined.

B. Bivens Damages Claim Against Each of the Individual Department of State and National Security Council Defendants who is Named in his or her Individual Capacity.

Count 15

172. Plaintiff incorporates by reference the allegations in paragraphs 1 through 171.

173. Plaintiff has a clearly established right protected by the First and Fifth Amendments to adequate, effective, and meaningful access to the courts.

174. By providing Plaintiff with false and deceptive information related to her husband and otherwise concealing whether he was alive, the Department of State and National Security Council Defendants deprived Plaintiff of her right protected by the First and Fifth Amendments to adequate, effective, and meaningful access to the courts.

175. This false and deceptive information and concealment foreclosed Plaintiff from effectively seeking adequate legal redress.

176. The Department of State and National Security Council Defendants intentionally misled Plaintiff in this manner because, while he was still alive, they did not want to

threaten their ability to obtain information from Mr. Bamaca through his detention and torture, and because, at all times, they did not want their role or the role of any of the other Defendants in Mr. Bamaca's secret imprisonment, torture and extrajudicial execution to be revealed. The Department of State and National Security Council Defendants feared that, if Plaintiff sought legal redress, these objectives would be undermined.

177. The Department of State and National Security Council Defendants acts were intentional, wilful and malicious.

IV. Violations of Plaintiff's First Amendment Rights of Freedom of Speech and to Petition the Government

A. Claim For Declaratory and Injunctive Relief Against Defendants the Department of State and the National Security Council and each of the individual Department of State and National Security Council Defendants who is Named in his or her Official Capacity.

Count 16

178. Plaintiff incorporates by reference the allegations in paragraph 1 through 177.

179. Defendants the Department of State and the National Security Council have a long-standing policy, pattern or practice of providing false and deceptive information, through fraudulent statements and intentional omissions, as to the fate of anyone injured or killed through the CIA's long-standing policy, pattern or practices related to the extraction of information.

180. The Department of State and National Security Council Defendants adhered to this policy, pattern or practice

when they provided Plaintiff with false and deceptive information related to her husband and otherwise concealed whether he was alive.

181. By providing such false and deceptive information and by otherwise concealing information regarding Mr. Bamaca's true situation, the Department of State and National Security Council Defendants deprived Plaintiff of her rights protected by the First Amendment of the United States Constitution to exercise her freedom of speech and to petition the government.

182. As a result of the fraudulent statements and intentional omissions made to her by the Department of State and National Security Council Defendants, Plaintiff was unable to take appropriate actions to save her husband's life or otherwise to take reasonable steps to respond to his fate. Specifically, Plaintiff was foreclosed from effectively petitioning the appropriate government authorities, and from effectively seeking to publicize her husband's plight through the media.

183. The Department of State and National Security Council Defendants intentionally misled Plaintiff in this manner because, while he was still alive, they did not want to threaten their ability to obtain information from Mr. Bamaca through his detention and torture, and because, at all times, they did not want their role or the role of any of the other Defendants in Mr. Bamaca's secret imprisonment, torture and extrajudicial execution to be revealed. The Department of State and National Security Council Defendants feared that, if Plaintiff petitioned the appropriate government authorities or sought to publicize her husband's plight through the media, these objectives would be undermined.

B. Bivens Damages Claims Against Each of the Individual Department of State and National Security Council Defendants who is Named in his or her Individual Capacity.

Count 17

184. Plaintiff incorporates by reference the allegations in paragraphs 1 through 183.

185. By providing Plaintiff with false and deceptive information related to her husband and otherwise concealing whether he was alive, the Department of State and National Security Council Defendants deprived Plaintiff of her clearly established rights protected by the First and Fifth Amendments to exercise her freedom of speech and to petition the government.

186. As a result of the fraudulent statements and intentional omissions made to her the Department of State and National Security Council Defendants, Plaintiff was unable to take appropriate actions to save her husband's life or otherwise to take reasonable steps to respond to his fate. Specifically, Plaintiff was foreclosed from effectively petitioning the appropriate government authorities, and from effectively seeking to publicize her husband's plight through the media.

187. The Department of State and National Security Council Defendants intentionally misled Plaintiff in this manner because, while he was still alive, they did not want to threaten their ability to obtain information from Mr. Bamaca through his detention and torture, and because, at all times, they did not want their role or the role of any other Defendants in Mr. Bamaca's secret imprisonment, torture and extrajudicial execution to be revealed. The Department of State and National Security Council Defendants feared that, if Plaintiff petitioned the appropriate government authorities or

sought to publicize her husband's plight through the media, these objectives would be undermined.

188. The Department of State and National Security Council Defendants' acts were intentional, wilful and malicious.

V. Tort Claims

A. Additional Factual Allegations In Support of Plaintiff's Tort Claims.

189. Pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2401(b) and 2675, Plaintiff filed notices of claim with the Central Intelligence Agency, the Department of State and the National Security Council on March 9, 1996.

190. This notice raised all of the tort claims asserted herein.

191. Plaintiff received verification that the CIA received the notice of claim on March 14, 1996.

192. Plaintiff received verification that the Department of State received the notice of claim on March 14, 1996.

193. Plaintiff received verification that the National Security Council received the notice of claim on March 15, 1996.

194. The Central Intelligence Agency denied Plaintiff's claims by letter dated September 22, 1996.

195. The Department of State and the National Security Council have failed to respond to the claims filed with them. Pursuant to 28 U.S.C. § 2675(a), Plaintiff hereby elects to deem those claims denied.

B. Tort Claims Against the CIA Defendants.

Count 18
(Intentional Infliction of Emotional Distress)

196. Plaintiff incorporates by reference the allegations in paragraphs 1 through 195.

197. The CIA Defendants' imprisonment, torture, and extrajudicial execution of Mr. Bamaca constituted extreme and outrageous conduct.

198. This extreme and outrageous conduct was engaged in intentionally or recklessly and caused both Mr. Bamaca and Plaintiff to endure severe physical and emotional distress.

Count 19
(Intentional Infliction of Emotional Distress)

199. Plaintiff incorporates by reference the allegations in paragraphs 1 through 198.

200. The CIA Defendants collaborating and/or conspiring with and/or directing Julio Roberto Alpirez and/or others who intentionally and secretly imprisoned, tortured and extrajudicially executed Mr. Bamaca constituted extreme and outrageous conduct.

201. This extreme and outrageous conduct was engaged in intentionally or recklessly and caused both Mr. Bamaca and Plaintiff to endure severe physical and emotional distress.

Count 20
(Negligent Supervision that Resulted
in the False Imprisonment of Mr. Bamaca)

202. Plaintiff incorporates by reference the allegations in paragraphs 1 through 201.

203. The CIA Defendants hired Julio Roberto Alpirez and/or others who intentionally and secretly imprisoned, tortured and extrajudicially executed Mr. Bamaca in the course of attempting to obtain the information sought by the CIA.

204. These actions resulted in the false imprisonment of Mr. Bamaca.

205. This false imprisonment of Mr. Bamaca was caused by the CIA Defendants' negligent supervision of Julio Roberto Alpirez and/or others whom they had hired to extract information from Mr. Bamaca.

206. The CIA Defendants should have foreseen that Mr. Bamaca might be subjected to false imprisonment because they knew or should have known that Mr. Alpirez and/or others from whom they were seeking to purchase this information would resort to such methods to obtain the information both because the CIA Defendants had trained Mr. Alpirez and/or others to use such methods at the CIA's School of the Americas and because the CIA Defendants were aware that such methods were regularly employed by Mr. Alpirez and other members of the Guatemalan military.

Count 21
(Negligent Supervision that Resulted
in the Assault and Battery of Mr. Bamaca)

207. Plaintiff incorporates by reference the allegations in paragraph 1 through 206.

208. The CIA Defendants hired Julio Roberto Alpirez and/or others who intentionally and secretly imprisoned,

tortured and extrajudicially executed Mr. Bamaca in the course of attempting to obtain the information sought by the CIA.

209. These acts were intentional and resulted in the assault and battery of Mr. Bamaca.

210. This assault and battery of Mr. Bamaca was caused by the CIA Defendants' negligent supervision of Julio Roberto Alpirez and/or others whom they had hired to extract information from Mr. Bamaca.

211. The CIA Defendants should have foreseen that Mr. Bamaca might be subjected to assault and battery because they knew or should have known that Mr. Alpirez and/or others from whom they were seeking to purchase this information would resort to such methods to obtain the information both because the CIA Defendants had trained Mr. Alpirez and/or others to use such methods at the CIA's School of the Americas and because the CIA Defendants were aware that such methods were regularly employed by Mr. Alpirez and other members of the Guatemalan military.

Count 22
(Negligent Supervision that Resulted
in the Wrongful Death of Mr. Bamaca)

212. Plaintiff incorporates by reference the allegations in paragraphs 1 through 211.

213. The CIA Defendants hired Julio Roberto Alpirez and/or others who intentionally and secretly imprisoned, tortured and extrajudicially executed Mr. Bamaca in the course of attempting to obtain the information sought by the CIA.

214. These acts were intentional and resulted in the wrongful death of Mr. Bamaca.

215. The wrongful death of Mr. Bamaca was caused by the CIA Defendants' negligent supervision of Julio

Roberto Alpirez and/or others whom they had hired to extract information from Mr. Bamaca.

216. The CIA Defendants should have foreseen that the wrongful death of Mr. Bamaca might occur because they knew or should have known that Mr. Alpirez and/or others from whom they were seeking to purchase this information would resort to such methods to obtain the information both because the CIA Defendants had trained Mr. Alpirez and/or others to use such methods at the CIA's School of the Americas and because the CIA Defendants were aware that such methods were regularly employed by Mr. Alpirez and other members of the Guatemalan military.

C. Tort Claims Against the Department of State and the National Security Council Defendants.

Count 23
(Intentional Infliction of Emotional Distress)

217. Plaintiff incorporates by reference the allegations in paragraphs 1 through 216.

218. The Department of State and National Security Council Defendants' intentionally deceptive statements and omissions to Plaintiff about her husband, including concealing whether or not he was alive, constituted extreme and outrageous conduct.

219. This extreme and outrageous conduct was engaged in intentionally or recklessly and caused Plaintiff to endure severe physical harm and emotional distress.

Count 24
(Intentional Misrepresentation)

220. Plaintiff incorporates by reference the allegations in paragraphs 1 through 29.

221. The Department of State and National Security Council Defendants made intentionally deceptive statements and omissions to Plaintiff, and/or negligently supervised others who made such intentionally deceptive statements and omissions to Plaintiff, related to her husband and whether or not he was alive.

222. These deceptive statements and omissions were material to Plaintiff's efforts to re-unite with her husband and foreclosed Plaintiff from effectively seeking adequate legal redress, petitioning the appropriate government authorities, and seeking to publicize her husband's plight through the media.

223. The Department of State and National Security Council Defendants made these intentionally deceptive statements and omissions and/or negligently supervised others who made such intentionally deceptive statements and omissions, to Plaintiff with knowledge of their deceptiveness or falsity and with the intent to deceive Plaintiff.

224. Reliance upon these false and deceptive representations caused damage to the Plaintiff by thwarting her efforts to re-unite with her husband or obtain his remains and by foreclosing her from effectively seeking adequate legal redress, petitioning the appropriate government authorities, and seeking to publicize her husband's plight through the media.

225. Reliance upon these false and deceptive representations also caused Plaintiff to incur extreme physical and emotional distress, and economic injuries.

Count 25
(Negligent Misrepresentation)

226. Plaintiff incorporates by reference the allegations in paragraphs 1 through 225.

227. The Department of State and National Security Council Defendants negligently communicated deceptive or

false statements or omissions, and/or negligently supervised others who intentionally or negligently communicated false and deceptive information, to Plaintiff related to her husband and whether he was alive.

228. This false and deceptive information was material to Plaintiff's efforts to re-unite with her husband and foreclosed Plaintiff from effectively seeking adequate legal redress, petitioning the appropriate government authorities, and seeking to publicize her husband's plight through the media.

229. The Department of State and National Security Council Defendants intended or should have recognized that the Plaintiff would likely be imperiled by action taken in reliance upon this deceptive or false information.

230. Reliance upon this deceptive or false information caused damage to the Plaintiff by thwarting her efforts to re-unite with her husband or obtain his remains and by foreclosing her from effectively seeking adequate legal redress, petitioning the appropriate government authorities, and seeking to publicize her husband's plight through the media.

231. Reliance upon these false and deceptive representations also caused Plaintiff to incur extreme physical and emotional distress, and economic injuries.

Count 26
(Constructive Fraud)

232. Plaintiff incorporates by reference the allegations in paragraphs 1 through 231.

233. The Department of State and National Security Council Defendants innocently or negligently communicated false or deceptive information, and/or negligently supervised others who intentionally, innocently or negligently communicated false or deceptive information to Plaintiff related to her husband and whether he was alive.

234. This false or deceptive information was material to Plaintiff's efforts to re-unite with her husband and foreclosed Plaintiff from effectively seeking adequate legal redress, petitioning the appropriate government authorities, and seeking to publicize her husband's plight through the media.

235. The Department of State and National Security Council Defendants intended for Plaintiff to believe the information conveyed and intended to induce Plaintiff's reliance on that information.

236. Reliance upon this deceptive information caused damage to the Plaintiff by thwarting her efforts to re-unite with her husband or obtain his remains and by foreclosing her from effectively seeking adequate legal redress, petitioning the appropriate government authorities, and seeking to publicize her husband's plight through the media.

237. Reliance upon this false or deceptive information also caused Plaintiff to incur extreme physical and emotional distress, and economic injuries.

Count 27
(Interference with the Right to
Possess a Spouse's Dead Body)

238. Plaintiff incorporates by reference the allegations in paragraph 1 through 237.

239. The Department of State and National Security Council Defendants negligently or intentionally interfered, and continue to negligently or intentionally interfere, with Plaintiff's right to possess and dispose of her spouse's dead body through deceptive or false statements or omissions and/or negligently supervising others who communicated such deceptive or false information, to Plaintiff related to her husband including, but not limited to, the time, date and place of his execution, and the location of his remains.

240. As a result of this interference, plaintiff suffered severe emotional, physical and economic injuries.

VI. International Torts Against Each of the Individual CIA Defendants Named in his or her Individual Capacity

Count 28

241. Plaintiff incorporates by reference the allegations in paragraphs 1 through 240.

242. By participating and/or collaborating in the disappearance, prolonged arbitrary detention, torture, extrajudicial execution, and cruel, inhuman or degrading treatment of Mr. Bamaca, and/or by conspiring or collaborating with and/or directing others who committed such acts, the CIA Defendants violated international law, including the law of war, the law of the United States, and the laws of the District of Columbia, Virginia and Guatemala.

243. As a direct result of Defendants' international law violations, Mr. Bamaca was placed in great fear for his life and suffered severe physical abuse and agony before his death, and Plaintiff suffered extreme emotional and physical distress, as well as the loss of the companionship of her spouse.

244. The CIA Defendants' acts were intentional, wilful and malicious.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against the Defendants as follows:

a) For declaratory and injunctive relief as follows:
   (i) a declaration that each of the Defendants' actions complained of herein violate the United States Constitution;
   (ii) an order that Defendants disclose to Plaintiff all known information concerning her husband's death and the location of his body; and
   (iii) an injunction enjoining Defendants from taking such actions in the future.

b) For compensatory damages in the amount proven at trial;

c) For punitive damages;

d) For reasonable attorneys' fees and costs; and

e) For such other and further relief as the Court may deem just and proper.

A jury trial is demanded on all issues.

Respectfully Submitted,

/s/ Ann M. Kapler

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March 30, 1998

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JENNIFER K. HARBURY, on her own behalf and as administratrix of the Estate of Efrain Bamaca-Velasquez,	)	
Plaintiff,	)	
v.	)	C.A. 96-0438 (NHJ)
JOHN M. DEUTCH, Director, Central Intelligence Agency; et. al.	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

Defendants, by and through undersigned counsel and pursuant to Fed. Rules Civ. P. 12(b)(1) – (6), respectfully move to dismiss the complaint in this action. As support for their motion, these defendants file herewith a Memorandum of Points and Authorities, which is incorporated by reference. An order consistent with this relief accompanies this motion.

Respectfully Submitted,
/s/ Eric H. Holder, Jr.
ERIC H. HOLDER, JR.,
DC BAR #303115
United States Attorney

/s/ R. Craig Lawrence
R. CRAIG LAWRENCE
DC BAR #171538
Assistant United States Attorney

/s/ Kimberly N. Tarver
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Assistant United States Attorney

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

December 10, 2001

Mr. Richard Adams Cordray
4900 Grove City Road
Grove City, OH 43123

Re: Warren Christopher, former Secretary of State, et al.
v. Jennifer K. Harbury
No. 01-394

Dear Mr. Cordray:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted.

Sincerely,

/s/ William K. Suter

William K. Suter, Clerk

(5)

Supreme Court, U.S.
FILED
JAN 24 2002
CLERK

No. 01-394

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

WARREN CHRISTOPHER, MARILYN MCAFEE, ALEXANDER WATSON, ANNE PATTERSON, PEG WILLINGHAM, ANTHONY LAKE, and RICHARD E. FEINBERG,

Petitioners,

v.

JENNIFER K. HARBURY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

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BRIEF FOR PETITIONERS

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59 pp

QUESTIONS PRESENTED

1. Whether allegations that senior State Department and National Security Council officials withheld information and intentionally misled a private citizen about a foreign rebel leader in the captivity of a foreign government state a violation of the constitutional right of access to the courts, when the only claim is that defendants' speech was intentionally misleading and there are no allegations that the plaintiff ever tried to file a lawsuit and was actually hindered in that effort?

2. If the Court concludes that a constitutional violation is properly grounded on allegations such as these, whether government officials violate clearly established law whenever they allegedly mislead a private citizen or conceal information and it is later claimed that they intended to and did hinder the filing of a hypothetical lawsuit?

PARTIES TO THE PROCEEDING

The petitioners in this case all are or were officials with the Department of State or the National Security Council. The Department of State petitioners are Warren Christopher (former Secretary of State), Marilyn McAfee (former Ambassador to Guatemala), Alexander Watson (as Assistant Secretary for InterAmerican Affairs), Anne Patterson (as Deputy Assistant Secretary of InterAmerican Affairs), and Peg Willingham (as Guatemala Desk Officer). The National Security Council petitioners are Anthony Lake (former National Security Advisor and head of the National Security Council) and Richard E. Feinberg (as a staff member of the National Security Council). Petitioners are defendants in this case and were the appellees in the court below. Also named as defendants in this case were three former directors of the Central Intelligence Agency (John M. Deutch, R. James Woolsey, and Robert M. Gates); fourteen officials and employees of the Central Intelligence Agency (David Cohen, John J. DeVine, Hugh E. Price, Thomas A. Twetten, John C. Gannon, Douglas J. MacEachin, John L. Helgerson, Terry R. Ward, Brian Latelle, Richard N. Cooper, Christine N. Williams, Joseph S. Nye, Fritz W. Esmarth, Dan Donahue, and Frederick A. Brugger), unnamed employees of the Department of State, National Security Council, and Central Intelligence Agency; the Department of State, National Security Council, and Central Intelligence Agency; and the United States of America (which was substituted as a party for purposes of the tort claims asserted originally against the named defendants). All of the petitioners are individuals or government entities, and thus there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

Jennifer K. Harbury is the plaintiff in this case on her own behalf and as administratrix of the Estate of Efrain Bamaca-Velasquez, and she was the appellant in the court below.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. The Allegations in the Complaint 3

B. The District Court Proceedings 6

C. The Decision by the Court of Appeals 8

SUMMARY OF ARGUMENT 11

ARGUMENT 12

I. RESPONDENT DOES NOT STATE A VALID CLAIM BASED ON THE RIGHT OF ACCESS TO THE COURTS IN THIS *BIVENS* ACTION 13

A. Respondent's Substantive Due Process Claim Finds No Support in the Court's Precedents 13

TABLE OF CONTENTS
(continued)

PAGE

B. The Due Process Clause Was Not Violated Because Respondent Was Never Denied Access to the Courts 23

C. Respondent Has No Cognizable *Bivens* Action . 33

II. THE COURT SHOULD UPHOLD THE DEFENSE OF QUALIFIED IMMUNITY HERE EVEN IF IT RECOGNIZES THIS CONSTITUTIONAL CLAIM FOR THE FIRST TIME IN THIS CASE 39

A. Qualified Immunity Shields Officials from Liability Where the Unlawfulness of Their Conduct Was Not Clear from Preexisting Law 39

B. At the Time Petitioners Acted, the Lower Courts Had Not Settled the Due Process Issue 42

C. Respondent's Alleged Right-of-Access Claim Is Not Clearly Established Even Today 47

CONCLUSION 48

TABLE OF AUTHORITIES

PAGE

Cases

Albright v. Oliver, 510 U.S. 266 (1994) 23, 27, 28
Anderson v. Creighton, 483 U.S. 635 (1987) 40, 42
ASARCO Inc. v. Kadish, 490 U.S. 605 (1989) 32
Bailey v. Glover, 88 U.S. (21 Wall.) 342 (1874) 27
Baldrige v. Shapiro, 455 U.S. 345 (1982) 35
Barrett v. United States, 798 F.2d 565 (2d Cir. 1986) 43
Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984) 28, 29, 42, 44, 46
Bennett v. Spear, 520 U.S. 154 (1996) 29
Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) ..... *passim*
Boddie v. Connecticut, 401 U.S. 371 (1977) 13, 15
Bondu v. Gurvich, 473 So. 2d 1307 (Fla. App. 1984), *review denied*, 484 So. 2d 7 (Fla. 1986) 28
Bounds v. Smith, 430 U.S. 817 (1977) 8, 13, 16, 17
Boyd v. Travelers Ins. Co., 652 N.E.2d 267 (Ill. 1995) ... 28
Burns v. Ohio, 360 U.S. 252 (1959) 15
Bush v. Lucas, 462 U.S. 367 (1983) 34, 35, 36
Butz v. Economou, 438 U.S. 478 (1978) 40
California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 13
Carlson v. Green, 446 U.S. 14 (1980) 34
Chambers v. Baltimore & O.R.R., 207 U.S. 142 (1907) 13, 14
Chambers v. Nasco, Inc., 501 U.S. 32 (1991) 29
Chappell v. Wallace, 462 U.S. 296 (1983) 38
City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 6
Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 14
Coleman v. Eddy Potash, Inc., 905 P.2d 185 (N.M. 1995) 28
Collins v. City of Harker Heights, 503 U.S. 115 (1992) .. 19

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

Correctional Servs. Corp. v. Malesko,
122 S. Ct. 515 (2001) 33, 34
Crowder v. Sinyard, 884 F.2d 804 (5th Cir. 1989),
cert. denied, 496 U.S. 924 (1990) 18, 25, 41, 44, 47
Daniels v. Williams, 474 U.S. 327 (1986) 27
Davis v. Passman, 442 U.S. 228 (1979) 26, 34
Davis v. Scherer, 468 U.S. 183 (1984) 40, 41, 48
Delew v. Wagner, 143 F.3d 1219 (9th Cir. 1998) ... *passim*
Department of the Air Force v. Rose,
425 U.S. 352 (1976) 35
DeShaney v. Winnebago County Dep't of Social Servs.,
489 U.S. 189 (1989) 17
Dugan v. Rank, 372 U.S. 609 (1963) 31
Elder v. Holloway, 510 U.S. 510 (1994) 40
Ellis v. Magee & Devereux, 2001 WL 167744
(E.D. La. Feb. 15, 2001) 44
Exploration Co. v. United States, 247 U.S. 435 (1918) ... 27
FDIC v. Meyer, 510 U.S. 471 (1994) 34, 37, 38
*Federated Mut. Ins. Co. v. Litchfield Precision
Components, Inc.*, 456 N.W.2d 434 (Minn. 1990) 28
Foster v. City of Lake Jackson,
28 F.3d 425 (5th Cir. 1994) 28, 44
Frazier v. Cupp, 394 U.S. 731 (1969) 21
Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949),
cert. denied, 339 U.S. 949 (1950) 40
Griffin v. Illinois, 351 U.S. 12 (1956) 15
Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995) . 31
Hansen v. Harris, 619 F.2d 942 (2d Cir. 1980)
(Friendly, J., dissenting), *rev'd sub nom. Schweiker
v. Hanson*, 450 U.S. 785 (1981) 38
Harbury v. CIA, No. 95-CV-1431 (D.D.C.) 5, 36

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

Harbury v. Department of State, et al.,
No. 97-CV-305 (D.D.C.) 5, 36
Harlow v. Fitzgerald, 457 U.S. 800 (1982) ... 40, 41, 42, 45
Hazen v. Municipality of Anchorage,
718 P.2d 456 (Alaska 1986) 28
Henry v. Deen, 310 S.E.2d 326 (N.C. 1984) 28
Holmes v. Amerex Rent-A-Car,
180 F.3d 294 (D.C. Cir. 1999) 28
Hudson v. Palmer, 468 U.S. 517 (1984) 26
Hull, Ex parte, 312 U.S. 546 (1941) 16
Hunter v. Bryant, 502 U.S. 224 (1991) (per curiam) 47
Illinois v. Perkins, 496 U.S. 292 (1990) 19
INS v. Hibi, 414 U.S. 5 (1973) (per curiam) 37
INS v. Miranda, 459 U.S. 14 (1982) (per curiam) 37
Jacobson v. United States, 503 U.S. 540 (1992) 19
John Doe Agency v. John Doe Corp.,
493 U.S. 146 (1989) 35
Johnson v. Avery, 393 U.S. 483 (1969) 13, 16
Jones v. Union Guano Co., 264 U.S. 171 (1924) 14
La Raia v. Superior Ct., 722 P.2d 286 (Ariz. 1986) 28
Larson v. Domestic & Foreign Commerce Corp.,
337 U.S. 682 (1949) 32
Ledbetter v. Edwards, 35 F.3d 1062 (6th Cir. 1994) 21
Lewis v. Casey, 518 U.S. 343 (1996) 17, 18, 25
Linda R.S. v. Richard D., 410 U.S. 614 (1973) ... 29, 31, 32
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) .. 30, 32
Lujan v. G&G Fire Sprinklers, 121 S. Ct. 1446 (2000) ... 26
Malley v. Briggs, 475 U.S. 335 (1986) 40, 41, 42, 48
Malone v. Bowdin, 369 U.S. 643 (1962) 32
Mitchell v. Forsyth, 472 U.S. 511 (1985) . 21, 40, 41, 45, 47
M.L.B. v. S.L.J., 519 U.S. 102 (1996) 15
NAACP v. Button, 371 U.S. 415 (1963) 13

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

National Hockey League v. Metro Hockey Club, 427 U.S. 639 (1976) (per curiam) 28
NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975) 35
Office of Personnel Mgmt. v. Richmond, 496 U.S. 414 (1990) 37, 38
Ortwein v. Schwab, 410 U.S. 656 (1973) (per curiam) ... 15
Parratt v. Taylor, 451 U.S. 527 (1981) 26, 27, 29
Paul v. Davis, 424 U.S. 693 (1976) 33
Procunier v. Martinez, 416 U.S. 396 (1974) 16
Procunier v. Navarette, 434 U.S. 555 (1978) 41, 46, 47
Reno v. Arab-American Anti-Discrimination Comm., 525 U.S. 471 (1999) 23
Rosenblit v. Zimmerman, 766 A.2d 749 (N.J. 2001) 28
Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983) 28, 29, 43, 44
Saucier v. Katz, 121 S. Ct. 2151 (2001) 12, 40, 43
Scheuer v. Rhodes, 416 U.S. 232 (1974) 47
Schweiker v. Chilicky, 487 U.S. 412 (1988) .. 33, 35, 36, 37
Schweiker v. Hansen, 450 U.S. 785 (1981) (per curiam) .. 37
Shaw v. Murphy, 121 S. Ct. 1475 (2001) 14
Siegert v. Gilley, 500 U.S. 226 (1991) 12
Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976) 30, 31, 32
Smith v. Howard Johnson Co., 615 N.E.2d 1037 (Ohio 1993) 28
Snyder v. Massachusetts, 291 U.S. 97 (1934) 27
Swekel v. City of River Rouge, 119 F.3d 1259 (6th Cir. 1997) ..... *passim*
Thornburgh v. Abbott, 490 U.S. 401 (1989) 17
Totten v. United States, 92 U.S. 105 (1876) 22
Troxel v. Granville, 530 U.S. 57 (2000) 19
United States v. Kras, 409 U.S. 434 (1973) 15

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

United States v. Palmer, 203 F.3d 55 (1st Cir. 2000) 21
United States v. Russell, 411 U.S. 423 (1973) 19
United States v. Standard Oil Co., 332 U.S. 301 (1947) .. 37
United States v. Stanley, 483 U.S. 669 (1987) 38
United States v. United States Dist. Ct., 407 U.S. 297 (1972) 45
United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) 38
Vasquez v. Hernandez, 60 F.3d 325 (7th Cir. 1995) 46
Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985) 14
Warth v. Seldin, 422 U.S. 490 (1975) 33
Washington v. Glucksberg, 521 U.S. 702 (1997) 19
Weigl v. Quincy Specialties Co., 601 N.Y.S.2d 774 (Sup. Ct. 1993) 28
Wilson v. Layne, 526 U.S. 603 (1999) ..... *passim*
Wolff v. McDonnell, 418 U.S. 539 (1974) 16
Wood v. Strickland, 420 U.S. 308 (1975) 47
Youngberg v. Romeo, 457 U.S. 307 (1982) 17
Zschernig v. Miller, 389 U.S. 429 (1968) 32

Constitutional Provisions, Statutes, and Rules

U.S. CONST. amend. I 2, 3, 13, 14
U.S. CONST. amend. V ..... *passim*
Freedom of Information Act, 5 U.S.C. § 552 ..... *passim*
5 U.S.C. § 552(a)(3) 35
5 U.S.C. § 552(a)(4)(E) 35
5 U.S.C. § 552(a)(4)(F) 35
5 U.S.C. § 552(a)(6)(A) 35
5 U.S.C. § 552(a)(6)(E) 35
5 U.S.C. § 552(b) 35
5 U.S.C. § 552(b)(1) 39

TABLE OF AUTHORITIES
(continued)

PAGE

Constitutional Provisions, Statutes, and Rules

5 U.S.C. § 1216(a)(3) 36
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1442 31
Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2671-80 ..... *passim*
28 U.S.C. § 2679(d)(2) 31
28 U.S.C. § 2680(a) 31
28 U.S.C. § 2680(h) 37
28 U.S.C. § 2680(k) 31
Fed. R. Civ. P. 54(b) 7

Other Authorities

David E. Sanger & Steven Lee Myers, *President Says U.S. Is "in Hot Pursuit" of Terror Group*, N.Y. TIMES, Sept. 29, 2001, at A1 10
H.R. Rep. No. 1497, 89th Cong., 2d Sess. 9 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2426 35
The Trial of Aaron Burr, 1 ROBERTSON'S REPORTS 186 ... 9

No. 01-394

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

WARREN CHRISTOPHER, MARILYN MCAFEE, ALEXANDER WATSON, ANNE PATTERSON, PEG WILLINGHAM, ANTHONY LAKE, and RICHARD E. FEINBERG,
Petitioners,

v.

JENNIFER K. HARBURY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF FOR PETITIONERS

INTRODUCTION

The court below held that a substantive due process right of access to the courts is triggered whenever government officials are alleged to have concealed information or misled private citizens, and at least one of their motivations was to avoid or forestall a lawsuit. This Court's few decisions in this area have never recognized any such sweeping constitutional right, and they should not be so extended in this case. Respondent's due process rights were not violated because she was never denied access to the courts. Moreover, even if the Court were to embrace this new due process right, respondent would not be authorized to pursue it by means of a *Bivens*

action. Finally, if the Court were to decide to allow parties in respondent's position henceforth to raise the novel constitutional right urged upon the Court here, then it should also uphold petitioners' defense of qualified immunity, based on the circumstances of this case and the uncertain state of the prevailing decisional law at the time they acted.

OPINIONS BELOW

The opinion of the Court of Appeals for the D.C. Circuit is reported as *Harbury v. Deutch*, 233 F.3d 596 (D.C. Cir. 2000), and is reprinted in the appendix to the petition for certiorari ("Pet. App.") at 1a-29a. That opinion reversed an order and opinion of the district court, which granted petitioners' motion to dismiss and upheld their defense of qualified immunity. The district court's unreported opinion is reprinted at Pet. App. 30a-57a. The court of appeals denied a timely petition for rehearing, reported as *Harbury v. Deutch*, 244 F.3d 956 (D.C. Cir. 2001), and reprinted at Pet. App. 61a-68a. The court of appeals also denied a suggestion of rehearing *en banc*, with two judges dissenting, reported as *Harbury v. Deutch*, 244 F.3d 960 (D.C. Cir. 2001), and reprinted at Pet. App. 69a-71a.

STATEMENT OF JURISDICTION

The court of appeals denied a timely petition for rehearing on April 6, 2001. Pet. App. 61a. The Court extended the time for seeking certiorari to September 3, 2001. *See id.* at 72a-73a. The petition for certiorari was filed on September 1, 2001 and was granted on December 10, 2001. *See* J.A. 67. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part as follows:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

U.S. CONST. amend. V.

STATEMENT OF THE CASE

A. The Allegations in the Complaint.

Respondent filed suit in 1996 against the Department of State, National Security Council (NSC), Central Intelligence Agency (CIA), and numerous officials and employees from each agency in both their individual and official capacities. *See* J.A. 1-2. The individuals named in her lawsuit include former Secretary of State Warren Christopher, former NSC head Anthony Lake, and former Ambassador to Guatemala Marilyn McAfee. Respondent asserted a variety of claims under state and federal law, including tort claims under the Federal Tort Claims Act (for which the United States of America has been substituted as a party), as well as constitutional claims for declaratory and injunctive relief, among which was a claim that she was denied her right of access to the courts under the First and Fifth Amendments. *See id.* at 19-64. Respondent also sued the named individuals for damages based on her constitutional claims under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Defendants moved to dismiss on grounds of both failure to state a claim as a matter of law and qualified immunity. *See* J.A. 65-66; Pet. App. 7a.

In her Second Amended Complaint, respondent made the following factual allegations, which the courts have assumed to be true at this juncture. She is an American citizen and is the widow of Efrain Bamaca-Velasquez, a Guatemalan citizen and high-ranking commander of a Guatemalan rebel group, who vanished on March 12, 1992. *See* Pet. App. 2a, 30a; J.A. 23. Although the Guatemalan army declared that Bamaca had committed suicide during an armed skirmish and that it had buried his body, this was false. *See id.* at 26-27; Pet. App. 3a. Instead, Bamaca had been captured and detained by members of

the Guatemalan military, among whom were paid CIA informants. *See id.*; J.A. 27-28. The CIA allegedly was aware that Bamaca was being held by the Guatemalan army and that its paid agents would be involved in torturing him to obtain information, pursuant to Agency policies and practices of long standing. *See id.*; Pet. App. 5a.

The Complaint further alleged that early in 1993, respondent learned from an escaped prisoner that her husband was alive and being tortured. In March of 1993, she contacted several State Department officials, told them what she had learned, and asked for information about her husband. *See* Pet. App. 3a; J.A. 29-30. The officials promised to look into the matter and to assist her, but never provided her with any information. In August of 1993, she obtained permission to open Bamaca's grave and discovered that the body was not his. She immediately informed petitioner McAfee, who said she would investigate the matter and keep respondent informed, but did not provide her with any information thereafter. *See id.* at 30-31; Pet. App. 3a.

Based on respondent's allegations, Bamaca appears to have been executed sometime between March and September of 1993. *See* J.A. 27-31. Over the next year, between October 1993 to October 1994, respondent met repeatedly with State Department officials, who assured her they were looking into the matter and told her the Guatemalan military had advised them that it did not have (and had never had) custody of Bamaca. *See id.* at 32; Pet. App. 3a-4a. In October of 1994, the CBS news program *60 Minutes* reported that the U.S. Embassy in Guatemala had an intelligence report stating that Bamaca had been captured alive. In response, the State Department publicly confirmed his capture, stating that he had been lightly wounded and was held prisoner for some time, and that it had no information confirming that he was still alive. *See id.* at 4a; J.A. 34. The following month, respondent met with petitioner Lake, head of the NSC, who told her the government had "scraped the bottom of the barrel" for information about her husband, that no further information existed, and that he and

other officials would keep looking and keep her informed. *See id.*; Pet. App. 4a.

Respondent suspected that the State Department and NSC officials were withholding information and so in January of 1995 she filed a request under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA). *See* J.A. 34; Pet. App. 4a. The proceedings were expedited, but she did not receive any documents in the following months. *See* J.A. 35. Since that time, however, she has filed two lawsuits in federal court to press her FOIA requests, and after receiving thousands of pages of documents, she has voluntarily dismissed both actions. *See Harbury v. CIA*, No. 95-CV-1431 (D.D.C. filed July 31, 1995; stipulation of dismissal filed Jan. 28, 1999); *Harbury v. Department of State, et al.*, No. 97-CV-305 (D.D.C. filed Feb. 14, 1997; stipulation of dismissal filed Jan. 28, 1999).

In March of 1995, respondent commenced a hunger strike (her third) in front of the White House.[1] State Department and NSC officials had met with respondent just days before, and had told her that they believed Bamaca to be dead because so much time had passed with no evidence that he was still alive. *See* J.A. 35. A few days later, Congressman Bob Torricelli announced publicly that the murder of Bamaca had been ordered in 1992 by a Guatemalan army officer who was also a paid informant for the CIA. *See id.* at 36. Petitioners are alleged to have intentionally misled her and concealed information in an effort to conceal their role and the government's role in Bamaca's death, pursuant to the CIA's customary policies and practices. *See id.* at 36-37.

In the Second Amended Complaint, respondent raised a variety of tort claims, including intentional infliction of

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[1] In fact, this was respondent's third hunger strike; she had engaged in a week-long hunger strike in Guatemala City in September of 1993, and in another "highly publicized thirty-two day hunger strike" in Guatemala City in October of 1994, which had engaged the attention of the news media, including Mike Wallace, a reporter from the much-watched *60 Minutes* television program. *See* J.A. 31-36.

emotional distress, negligent supervision, and wrongful death, as well as a claim for alleged violations of international law. *See* J.A. 54-62. She also raised three constitutional claims, including a claim that petitioners violated her constitutional right of access to the courts by misrepresenting and concealing information about her husband's fate that prevented her from "effectively petitioning the appropriate government authorities, and from effectively seeking to publicize her husband's plight through the media." *Id.* at 53.

B. The District Court Proceedings.

Defendants moved to dismiss all of respondents' claims. After full briefing, the district court (Kollar-Kotelly, J.) issued a detailed opinion that granted the motion to dismiss in part and dismissed respondent's constitutional claims, leaving her tort claims to proceed under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2671-80 (FTCA). *See* Pet. App. 30a-57a.

The court began by holding that defendants were not entitled to sovereign immunity on respondent's official capacity claims, since constitutional claims are a recognized exception to that defense. *See* Pet. App. 31a-32a. Nonetheless, it went on to apply *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), to hold that respondent lacked standing to press those claims for declaratory and injunctive relief. *See id.* at 32a-34a.

The district court then addressed the *Bivens* claims asserted against defendants in their individual capacities. The court concluded that each of respondent's constitutional claims was insufficient as a matter of law and, in the alternative, that defendants were entitled to qualified immunity. *See* Pet. App. 35a-55a.

In particular, the district court rejected respondent's claim that petitioners had infringed her constitutional right of access to the courts. The court concluded that this right protects more than mere physical access to the courts, but held, consistent with the decisions of several courts of appeals, that the claim "required the plaintiff to have already attempted to gain access to state-court remedies before bringing a constitutional denial-

of-access claim." Pet. App. 45a (citing cases). It quoted with approval the Sixth Circuit's observation that "[b]efore filing an 'access to courts' claim, a plaintiff must make some attempt to gain access to the courts; otherwise, how is this court to assess whether such access was in fact 'effective' and 'meaningful'?" *Swekel v. City of River Rouge*, 119 F.3d 1259, 1264 (6th Cir. 1997) (quoted at Pet. App. 46a). Since respondent had never taken this necessary step, her "suspicion that the alleged cover-up may have prejudiced her rights to bring a separate action is nothing more than a guess," *id.*, and her claim was insufficient as a matter of law.

Recognizing that dismissal without prejudice still would permit respondent later to refile her claim, the district court proceeded to consider the qualified immunity issue. It held that petitioners were entitled to qualified immunity because, at the time they acted, the cases recognizing an access-to-courts claim had all involved much more egregious conduct, whereby defendants had "destroyed evidence, manufactured evidence, or refused to satisfy a duty to investigate." Pet. App. 48a. By contrast, "[n]o such nefarious conduct" was alleged here: "Conspicuously absent from the Second Amended Complaint are allegations that Ambassador McAfee, NSA Lake, or any other State Department or NSC Defendants destroyed evidence, manufactured evidence, or refused to satisfy a duty to investigate." *Id.* Instead, respondent alleged only that petitioners had misled her by assuring her that "the government had no information about Bamaca and [making] allegedly disingenuous overtures to assist her." *Id.* In addition, given the sensitive subject matter, which touched on delicate matters of relations with a foreign government, the court stated it could not conclude that petitioners "would have reasonably known that they [had to] be forthcoming in discussing the intelligence that they had received about Bamaca." *Id.* Therefore they were entitled to qualified immunity on the access-to-courts claim.

Pursuant to Federal Rule of Civil Procedure 54(b), the district court certified its dismissal of respondent's *Bivens* claims as final, *see* Pet. App. 59a, and respondent appealed. While the appeal has proceeded, the district court has continued to move

forward on respondent's tort claims. Some of those claims were dismissed as a matter of law, but respondent's claims for negligent supervision and intentional infliction of emotional distress have been allowed to proceed. The parties are currently in discovery on those tort claims. *See* J.A. 10-14.

C. The Decision by the Court of Appeals.

The court of appeals (Edwards, Ginsburg, *Tatel*) affirmed the district court in almost all respects, but reversed and reinstated respondent's claimed violation of her constitutional right of access to the courts. *See* Pet. App. 1a-29a.

On respondent's access-to-courts claim, the court began by stating that the Constitution does confer such a right, which "not only protects the ability to get into court, . . . but also ensures that such access be 'adequate, effective, and meaningful.'" Pet. App. 21a (quoting *Bounds v. Smith*, 430 U.S. 817, 822 (1977)). It then discussed decisions from other circuits suggesting that, as the court of appeals put it, "government cover-ups can infringe the right of access to the courts." Pet. App. 21a. Petitioners argued that these other decisions were inapposite, because all involved instances "where police officers charged with investigating a crime destroy, conceal, or manufacture evidence in violation of statutory duties." *Id.* at 22a-23a. The court rejected this view, finding sufficient respondent's allegations that petitioners intentionally deceived her and that at least one of their motives was to prevent her from bringing suit. The court held that "regardless of whether State and NSC officials had an affirmative duty to provide information to [her] in the first place, the complaint states a clear case of denial of access to courts." *Id.* at 23a.

The court of appeals also rejected the principal basis for the district court's contrary decision – that respondent had never tried to file a lawsuit and thus had not been denied access to the courts. It recognized the apparent inconsistency of its decision with decisions by the Sixth and Ninth Circuits, which had rejected access-to-courts claims where plaintiffs had not yet completed prosecuting their tort claims and thus could not yet establish that their state court remedies had been rendered

ineffective. *See* Pet. App. 23a-24a (discussing *Swekel*, 119 F.3d at 1264, and *Delew v. Wagner*, 143 F.3d 1219, 1222-23 (9th Cir. 1998)). The court based its decision on the possibility that petitioners' alleged misstatements might have impaired respondent's ability to pursue effective injunctive relief, rather than to bring suit. Respondent's claim, the court explained, was that had she known all the true facts, she might have been able to take some action to save her husband's life, such as "'seeking adequate legal redress, petitioning the appropriate government authorities, and seeking to publicize her husband's true plight through the media.'" Pet. App. 24a (quoting Complaint, J.A. 37). The court noted that during oral argument respondent had elaborated that she might have sought "an emergency injunction based on an underlying tort claim for intentional infliction of emotional distress" or filed her FOIA requests sooner. *Id.* Because respondent had thus identified some possibility of irreparable harm from petitioners' conduct, the court of appeals held that the "exhaustion" requirement imposed by other courts was not applicable to her claims. *See id.* at 25a. And even though respondent could have decided to file a lawsuit or her FOIA requests at any time (and in fact did promptly file and vigorously pursue relief under FOIA), the court found that because of petitioners' alleged concealments she may not have known enough to do so. *See id.* at 24a-26a.

With respect to qualified immunity, the court of appeals rejected the district court's conclusion that the unlawfulness of petitioners' conduct would not have been apparent from extant case law. The district court had reasoned that the prior cases, unlike the instant case, had involved "allegations of 'nefarious conduct,' such as manufacturing false evidence or destroying or refusing to collect evidence," and that petitioners, unlike the defendants in those prior cases, were under no statutory obligation to investigate the matter. Pet. App. 26a. Instead, the court of appeals held that qualified immunity was inappropriate because respondent had generally alleged that she had been "affirmatively misled" by petitioners and that at least one of their purposes in doing so was to "prevent[] her from filing a lawsuit." *Id.* at 27a. The court did not specify the decisions

prior to 1993 that had clearly established the unlawfulness of such conduct, and did not identify any controlling decisions on this point. Instead, it purported to "[join] our sister circuits" by simply proclaiming that "we think it should be obvious to public officials that they may not affirmatively mislead citizens for the purpose of protecting themselves from suit." *Id.* at 28a.

A timely petition for rehearing and suggestion for rehearing *en banc* was denied, *see* Pet. App. at 61a-71a, with Judges Henderson and Sentelle dissenting. Judge Henderson's dissent agreed with the district court that respondent "suffered no constitutional deprivation or, alternatively, if she did, the individual defendants are entitled to qualified immunity from liability therefor." *Id.* at 70a. Because respondent had not identified "any effective relief" that had been foreclosed by petitioners' alleged misstatements and nondisclosures, she could not establish that their conduct was "a substantial cause of [her] failure to obtain judicial relief," which would be a necessary component of her right-of-access claim. *Id.* (quotation omitted). Moreover, the extant precedents were so sparse and distant from respondent's allegations that petitioners would not have been "on notice that such very different conduct might violate [respondent's] right of access to the courts." *Id.* at 71a.

The panel commented further in response to the dissent. First, the panel expressly noted that its holding did in fact extend the law beyond "the general requirement that prior to bringing a claim for deprivation of access to courts based on an alleged cover-up, plaintiff must first press her underlying claims to ensure that the alleged cover-up in fact prejudiced her ability to seek relief." Pet. App. 62a. Nonetheless, it contended that this extension was justified because respondent had alleged that petitioners' conduct "completely foreclosed" her ability to obtain a specific form of relief in a hypothetical lawsuit – injunctive relief based on a tort claim for intentional infliction of emotional distress – that could perhaps have saved her husband's life. *Id.* It also suggested that the opinion was narrow in scope, being limited to situations where "defendants both affirmatively mislead plaintiffs and do so for the very purpose of protecting government officials from suit," including

efforts to protect either themselves or other officials. *Id.* Finally, with respect to qualified immunity, the panel reiterated that cases from other circuits involving thé fabrication of evidence, though factually distinct, were still sufficiently specific or pertinent to put petitioners on notice that their alleged conduct here would violate "clearly established" constitutional rights (though many of the cases cited postdated the conduct at issue here). *See id.* at 66a-67a.

Petitioners are the State Department and NSC officials who were sued in their individual capacity on the access-to-courts claim. Their timely petition for certiorari was granted on December 10, 2001. *See* J.A. 67.

SUMMARY OF ARGUMENT

The constitutional right of access to the courts is implicated only where government officials actually deny individuals access to the courts. Accordingly, this doctrine has been properly limited to instances where the government has erected some institutional bar to invoking ordinary legal processes or officials have imposed arbitrary restrictions on the ability of persons in government custody to access the legal system. Both situations are rooted in the Court's precedents, but neither is applicable here. As a general matter, private citizens are free to institute litigation at any time or to invoke other legal processes that are fully available to them. The Due Process Clause is not implicated merely because they are dissatisfied about their discussions with public officials or believe they have been deprived of accurate, useful, and timely information, where adequate avenues of redress remain open to them. This view accords with the Court's frequent warnings against the crafting of expansive new substantive due process rights, especially where, as here, doing so would tread on highly sensitive matters affecting the conduct of foreign policy.

Moreover, to assert a violation of the right of access, complaining parties must show that they have at least tried to bring suit in order to establish that the defendant has in fact caused them to be denied access to the judicial process. Here, respondent has merely asserted that she could have brought

various hypothetical claims or sought more desirable remedies. In fact, respondent has filed various tort claims against petitioners here, some of which remain pending in the trial court. The court below wrongly dispensed with this exhaustion requirement in any situation where plaintiffs can allege some potential source of irreparable harm entitling them to a particular form of relief. Because other remedies and processes are available to citizens in this situation, it would be inappropriate to supplant them by fashioning such a far-reaching constitutional right here. Indeed, given the novelty of respondent's constitutional claim, along with various "special factors" that are present here, it is improper for the federal courts to allow her to pursue a *Bivens* action at all.

Finally, petitioners are entitled to qualified immunity. Even if they are now adjudged to have violated respondent's constitutional right of access to the courts, no such right was clearly established at the time they acted. None of the Court's decisions even hints at such a broad rule, and the extant case law in the lower courts was (and remains) inconsistent in addressing this issue. Because the unlawfulness of petitioners' conduct was far from apparent in light of preexisting law and the distinctive concerns raised by the context of this case, the district court correctly upheld their defense of qualified immunity.

ARGUMENT

The Court has held that in qualified immunity cases, courts "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *see also Saucier v. Katz*, 121 S. Ct. 2151, 2155-56 (2001); *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Accordingly, petitioners will address the two issues under review in the order specified: (1) Does respondent state a valid claim based on the right of access to the courts in this *Bivens* action? (2) If so, was this right "clearly established" in 1993 and 1994 so as to defeat petitioners' defense of qualified immunity? The decision below cannot be sustained on either point.

I. RESPONDENT DOES NOT STATE A VALID CLAIM BASED ON THE RIGHT OF ACCESS TO THE COURTS IN THIS *BIVENS* ACTION.

A. Respondent's Substantive Due Process Claim Finds No Support in the Court's Precedents.

The right-of-access claim asserted in this case goes far beyond the Court's precedents. Respondent contends that this substantive due process right has been recognized by the Court's decisions for more than a century and flows naturally from cases such as *Bounds v. Smith*, 430 U.S. 817 (1977). But a careful review of the relevant precedents reveals that they lend scant support for respondent's aggressive new due process claim.

The Court has discussed a constitutional right of access to the courts in only a few cases, which fall into two narrow categories: they involve *either* institutional mechanisms that directly preclude access to the courts, *see, e.g.*, *Chambers v. Baltimore & O.R.R.*, 207 U.S. 142, 147-50 (1907); *Boddie v. Connecticut*, 401 U.S. 371, 374-83 (1977), *or* arbitrary restrictions on judicial access for prisoners held in government custody, *see, e.g.*, *Bounds*, 430 U.S. at 821-33; *Johnson v. Avery*, 393 U.S. 483, 485-90 (1969). Both categories involve methods of literally barring potential litigants from accessing the legal system to assert their lawful claims.[2]

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[2] In addition to the Due Process Clause of the Fifth Amendment, respondent has also pleaded her right-of-access claim under the First Amendment. *See* J.A. 49-51. The Court has occasionally stated that individuals enjoy associational rights under the First Amendment that safeguard their ability to join into groups for purposes of pursuing litigation. *See California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (extending *Noerr-Pennington* antitrust exemption to combinations for invoking judicial and administrative processes); *NAACP v. Button*, 371 U.S. 415, 429-30 (1963) (nullifying state ban on associations soliciting and funding individuals in litigation). Yet the Court has held since that where parties allege that "they have been denied 'meaningful access to the courts' to present

In the first category, the Court has stated its disapproval of institutional mechanisms that systematically bar access to the courts. For example, the claim at issue in *Chambers* – which the Court rejected – was that the Ohio courts were improperly discriminating against citizens from other States by denying them the right to pursue wrongful death actions on the same terms as Ohio citizens. *See* 207 U.S. at 146-48. It was in this setting that the Court described the right of access to the courts as "one of the highest and most essential privileges of citizenship, [which] must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens." *Id.* at 148; *see also id.* (stating in *dicta* that the "right to sue and defend in the courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government."). Ultimately the Court found the alleged discrimination to be illusory and upheld the challenged law. *See id.* at 149-51.

Soon thereafter, the Court established that the Due Process Clause did not invalidate established procedural preconditions that had to be satisfied before filing certain types of civil suits. *See, e.g.*, *Jones v. Union Guano Co.*, 264 U.S. 171, 180-81 (1924) (requirement that plaintiff must first obtain chemical analysis of fertilizer before bringing product suit against fertilizer manufacturer judged to be "reasonable" in rejecting due process challenge). In a later case, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), the Court likewise upheld a requirement that a plaintiff must post security as a precondition to bringing a shareholder derivative action, concluding that the government "may set the terms on which it will permit

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their claims," their "First Amendment arguments, at base, are really inseparable from their due process claims" and consequently their "First Amendment claim has no independent significance." *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 335 (1985). *Cf. Shaw v. Murphy*, 121 S. Ct. 1475, 1478-79 & n.3 (2001) (rejecting First Amendment claims in context of legal assistance for prisoners). To the extent that respondent is pressing the argument, therefore, the First Amendment appears to add nothing to the legal analysis here.

litigations in its courts," as long as they are "reasonable." *Id.* at 552.

Another set of cases in this line concerns prospective litigants who are barred from the courts because of their inability to pay the required filing fees. In several cases, the Court has invalidated such restrictions under an analysis that relies on both the Due Process Clause and the Equal Protection Clause. *See Boddie v. Connecticut*, 401 U.S. 371, 374-83 (1977) (individuals cannot be denied access to courts to dissolve their marriage based on inability to pay required costs); *Burns v. Ohio*, 360 U.S. 252, 256-58 (1959) (individuals cannot be denied appellate review based on inability to pay filing fee); *Griffin v. Illinois*, 351 U.S. 12, 16-20 (1956) (Black, J.) (plurality opinion) (individuals cannot be denied appellate review in criminal cases based on inability to pay for transcript). In subsequent cases, however, the Court refused to extend these precedents to civil suits generally, *see Ortwein v. Schwab*, 410 U.S. 656 (1973) (per curiam); *United States v. Kras*, 409 U.S. 434 (1973), and recently the Court explained that the *Boddie* principle extends only to "a narrow category of civil cases," *i.e.*, those "involving state controls or intrusions on family relationships." *M.L.B. v. S.L.J.*, 519 U.S. 102, 113, 116 (1996).

It is apparent that none of these decisions has anything to do with the matter at hand. In this case, there is no institutional bar to suit by respondent. Instead, her allegation is merely that she was impeded in seeking injunctive relief because petitioners either concealed information or misled her about what they knew concerning her husband's fate in Guatemala. *See* Pet. App. 21a-25a; J.A. 49-51. This allegation, however, does not involve a denial of "access" to the courts. Moreover, in these circumstances, where petitioners are not alleged to have been under any legal duty to disclose whatever information they might have had, it is totally unclear as a constitutional matter what "process" respondent claims to have been "due" under the law.

The second narrow category of right-of-access decisions holds that the Due Process Clause prohibits arbitrary restrictions

on the right of access to the courts for detained prisoners. In *Ex parte Hull*, 312 U.S. 546 (1941), for example, the Court invalidated a state prison regulation that conferred unlimited discretion upon a designated functionary to prevent prisoners from filing petitions for habeas corpus unless they were deemed to be "properly drawn." *Id.* at 548-49. The Court tersely concluded that "[w]hether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine." *Id.* at 549.

In *Johnson v. Avery*, 393 U.S. 483 (1969), the Court struck down a state prison regulation that barred prisoners from advising or assisting one another in preparing legal papers where no other assistance was available to them. Once again, the Court rested its decision on the importance of habeas corpus as a mechanism for prisoners to challenge the legality of their incarceration: "Since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." *Id.* at 485; *see also Procunier v. Martinez*, 416 U.S. 396, 419-22 (1974) (invalidating similar restrictions on inmate interviews with law students or paralegals). In *Wolff v. McDonnell*, 418 U.S. 539 (1974), this holding was extended to civil rights actions, since "the demarcation line between civil rights actions and habeas petitions is not always clear" and both are employed to vindicate prisoners' constitutional rights. *Id.* at 579.

This line of decisions reached its apex in *Bounds*, in which the Court stated that "prisoners have a constitutional right of access to the courts" that must be "adequate, effective, and meaningful." 430 U.S. at 821-22. In *Bounds* itself, the Court construed this directive as requiring prison officials "to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828. *Bounds* is the central precedent that respondent has invoked in this case.

The Court's more recent precedents in this area have refused to expand the scope of the due process right recognized in *Bounds*. *See, e.g., Lewis v. Casey*, 518 U.S. 343 (1996) (overturning broad injunctive relief premised on alleged *Bounds* violations); *Thornburgh v. Abbott*, 490 U.S. 401, 409-12 (1989) (stating more permissive test for evaluating restrictions on prisoners). In *Lewis*, in particular, the Court expressly repudiated any "suggest[ion] that the State must enable the prisoner to *discover grievances*, and to *litigate effectively* once in court." 518 U.S. at 354 (emphasis in original). As the Court stated: "These elaborations upon the right of access to the courts have no antecedent in our pre-*Bounds* cases, and we now disclaim them." *Id.* The Court also clarified that prisoners' right of access to the courts applies only to limited types of claims: those that "attack their sentences, directly or collaterally," or "challenge the conditions of their confinement." *Id.* at 355; *see also id.* at 365 (Thomas, J., concurring) (expressing doubts about the validity of *Bounds* and "of a loosely defined 'right of access to the courts'").

In the end, this line of decisions offers no support for the due process claim that respondent asserts in this case. As an initial matter, the prisoner cases are distinct because in the "substantive due process analysis, it is the State's affirmative act of restraining the individual's right to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the 'deprivation of liberty' triggering the protections of the Due Process Clause." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 200 (1989); *see also Youngberg v. Romeo*, 457 U.S. 307, 315-17 (1982). No such denial of liberty has occurred here, and therefore cases such as *Bounds* are inapposite.

Indeed, the Fifth Circuit has expressed apt skepticism about applying precedents like *Bounds* in this very different setting:

> In the world of litigation outside prison walls, these cases are of little assistance. Unlike prisoners, ordinary individuals do not find any physical barriers between them and the courts. To file a complaint or

> legal paper, they need merely travel to the courthouse or even just the nearest mailbox; to get legal advice, they need only travel to a lawyer's office or the nearest law library, or pick up the telephone.

Crowder v. Sinyard, 884 F.2d 804, 811-12 (5th Cir. 1989), *cert. denied*, 496 U.S. 924 (1990).

In the wake of *Lewis*, it is now clear that the Constitution does not require government officials to take affirmative steps to enable prisoners who are in their custody to "discover grievances" and "to litigate effectively," even though their confinement substantially hampers their litigating capacity as "one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." 518 U.S. at 354-55 (emphasis omitted). Clearly, then, public officials are under no similar duty to take such steps on behalf of private citizens who enjoy continual and unfettered access to the federal and state court systems to file civil claims. Yet the court of appeals imposed just such a requirement in this case, upholding a right-of-access claim based merely on allegations that petitioners' statements impaired respondent in her ability "to litigate effectively" by leaving her with imperfect knowledge and dampened motivation to pursue an injunctive remedy.[3]

Moreover, the breadth of the ruling below ignores the Court's explicit reluctance to expand substantive due process

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[3] The decision below to uphold respondent's right-of-access claim, which alleges that she was "foreclosed from effectively seeking adequate legal redress, petitioning the appropriate government authorities, and seeking to publicize her husband's true plight through the media," J.A. 37, is highly ironic in light of her vigorous efforts in each category: (1) this lawsuit, which continues to proceed, as well as two other federal-court actions to enforce her rights under the FOIA to receive extensive government documents, *see supra* page 5; (2) her numerous and repeated meetings with petitioners and other high-ranking federal officials, J.A. 29-35; and (3) her three hunger strikes, the last of which was "highly publicized," and all of which generated extensive media coverage, *id.* at 31-36.

rights. *See, e.g.*, *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process, because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("We must therefore exercise the utmost care whenever we are asked to break new ground in this field" and thereby "place the matter outside the arena of public debate and legislative action") (quotation omitted); *Troxel v. Granville*, 530 U.S. 57, 76 (2000) (Souter, J., concurring) (cautioning against "turning any fresh furrows in the treacherous field of substantive due process") (quotation omitted).

There are obvious reasons to heed the Court's admonitions here, as the same sort of claim brought by respondent in this case would, if elevated to the level of a constitutional guarantee, apply to a wide range of essential government conduct. For example, sting operations and undercover investigations rely on deceptive statements; indeed, misleading the suspect *is the whole point* of such operations. Yet under the ruling below, a due process violation would arise whenever law enforcement officials mislead an individual who suffers imprisonment or death or some other irreparable harm as a result – *i.e.*, whenever the operation is successful – and he can allege that he might have invoked some legal process to avert this harm. Such results would be quite out of harmony with the Court's precedents. *See, e.g.*, *Jacobson v. United States*, 503 U.S. 540, 548 (1992) ("Artifice and strategem may be employed to catch those engaged in criminal enterprises.") (quotation omitted); *United States v. Russell*, 411 U.S. 423, 434 (1973) ("stealth and strategy are necessary weapons in the arsenal of the police officer") (quotation omitted).[4]

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[4] It is widely recognized that the exigencies of law enforcement at times will justify, if not commend, the practice of misleading or even lying to criminal suspects. *See, e.g.*, *Illinois v. Perkins*, 496 U.S. 292, 297 (1990) ("*Miranda* forbids coercion, not mere strategic deception" or "[p]loys to mislead a suspect"). It is settled law that such conduct

Similar cases are easy to envision. In a great variety of contexts, officials may be moved, for entirely legitimate reasons (or even somewhat illegitimate ones, based on momentary lapses of judgment), to deflect inquiries by withholding information or even suggesting, falsely, the absence of responsive information. To take just a few hypothetical examples: a federal prosecutor who finesses an inquiry about suspected criminal conduct in order to safeguard confidentiality and the presumption of innocence; a White House press officer who gives a cagy or misleading response about military activity so as not to harm ongoing operations; a Federal Reserve Board official who withholds information about contemplated regulatory action so as not to destabilize the economy; or a FOIA clerk who falsely suggests that a request will receive a prompt response even though he knows there is already a large backlog of requests. Under the ruling below, such situations would present potential constitutional violations and the discouraging prospect of personal liability.

It is not satisfactory to seek to dismiss these scenarios based on the suggestion that those government actors may be acting out of "legitimate" motives, rather than trying to insulate themselves from suit. For under the elastic standard asserted by respondent and accepted by the court below, a plaintiff need allege only that avoiding suit was "*one* of [the defendants']

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is constitutional even in the context of custodial interrogations, as long as it has not "overborne the will" of the suspect. *See, e.g.*, *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (no constitutional violation, and confession held voluntary where police falsely told defendant that his accomplice had confessed) *Ledbetter v. Edwards*, 35 F.3d 1062, 1066-70 (6th Cir. 1994); (defendant falsely told police matched his fingerprints to those found at scene and two witnesses identified him); *United States v. Palmer*, 203 F.3d 55, 59-62 (1st Cir. 2000) (defendant falsely told his accomplice was a child molester). The difficulties that would readily flow from respondent's substantive due process claim will not be lost on police officers, who under the ruling below could be held personally liable for pursuing confessions through entirely constitutional means.

express objectives." Pet. App. 23a (emphasis added). Moreover, as the court of appeals stressed in denying rehearing, on a motion to dismiss "*any* ambiguities or doubts concerning the sufficiency of the claim must be resolved in favor of the pleader." Pet. App. 63a (emphasis in original; quotation omitted). When the mixed-motive standard embraced by the court of appeals is combined with the permissive pleading rules that govern motions to dismiss, few if any *Bivens* defendants will be able to escape the demands of enduring a lawsuit. At that preliminary stage, bare allegations about the defendant's mental state are virtually unrebuttable where the plaintiff mixes into the complaint some alloy of illegitimate motive.[5]

In addition, in the circumstances of this case, respondent's claim of a due process violation is even more tenuous. To begin with, even indulging all inferences as is appropriate at this threshold stage, respondent's underlying factual allegations are extremely thin: she claims only that before her husband died she had contacted petitioners, who promised to look into the matter but never provided her with any information. *See supra* pages 4-5; J.A. 29-31. It is questionable whether those allegations alone can support any legitimate inference of untruth or wrongdoing. In fact, respondent's allegations about improper motivation are exactly the kind of bare assertions that could be offered in every case. In addition, the "disinformation" allegedly offered by petitioners to discourage a lawsuit might also, or primarily, have been provided to achieve other objectives, such as preserving the secrecy of government deliberations, of sensitive activities, or even of covert operations.

Indeed, it is generally acknowledged that "[s]pecial operations, by their nature, are cloaked in secrecy and deception, making it impossible to know whether the officials who discuss them obliquely are being completely candid."

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[5] This state of affairs would also destroy the important benefits that are conferred by the defense of qualified immunity, which is an "*immunity from suit* rather than a mere defense to liability," and which is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original).

David E. Sanger & Steven Lee Myers, *President Says U.S. Is "in Hot Pursuit" of Terror Group*, N.Y. TIMES, Sept. 29, 2001, at A1. Given the many considerations surrounding this work, it would be unrealistic and unwise to require officials rigidly to confine themselves solely to an empty "Glomar" response of refusing to comment. Under the ruling below, any attempt by officials to exercise judgment in finessing or deflecting such inquiries could readily be characterized as a misleading statement or material omission giving rise to a claimed constitutional violation. *See* Pet. App. 23a. In fact, it is notable that even discouraging a lawsuit *itself*, with its attendant disclosures and publicity, may be vital to achieving these other objectives by preserving the secrecy of sensitive government matters.

The court below suggested that these kinds of concerns are misplaced because petitioners remain free to plead a "national security" defense. Pet. App. 62a. Yet this extraordinary method of pleading should be – and has been – confined to the rarest and most exigent cases, since it rests on the premise that concerns about the national interest can be invoked to defeat the accepted judicial functions. *See Totten v. United States*, 92 U.S. 105, 107 (1876) (action involving matters of state secret cannot be maintained and must be dismissed without judicial examination). As Chief Justice Marshall once said of the doctrine, "[w]hat ought to be done under such circumstances presents a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country." *The Trial of Aaron Burr*, 1 ROBERTSON'S REPORTS 186. Indeed, as the Court recently stated in a related context, where the matters at issue involve "not merely the disclosure of normal domestic law enforcement priorities and techniques, but often the disclosure of foreign policy objectives and (as in this case) foreign intelligence products and techniques," the "Executive should not have to disclose its 'real' reasons . . . and, even if it did disclose them, a court would be ill equipped to determine their authenticity and utterly unable to assess their adequacy." *Reno v. Arab-American Anti-Discrimination Comm.*, 525 U.S. 471, 490-91 (1999). Thus it does not mitigate the unprecedented

nature of respondent's constitutional due process claim to urge the federal trial courts to invite more such constitutional crises.

For all of these reasons, the Court should hold that respondent has not stated a valid claim for violation of the Due Process Clause, thereby rejecting this invitation to veer sharply away from the consistent direction of its existing precedents. *Cf. Albright v. Oliver*, 510 U.S. 266, 271-75 (1994) (rejecting substantive due process claim to be free from prosecution except on the basis of probable cause).

B. The Due Process Clause Was Not Violated Because Respondent Was Never Denied Access to the Courts.

In this case, respondent claims that petitioners violated her due process rights even though she did not first try to file suit in order to establish that she actually was denied access to the courts. Under the standard adopted by other circuit courts, and expressly followed by the district court in this case, respondent's failure to meet this requirement would be dispositive of her due process claim. *Compare* Pet. App. 46a & n.2 *with id.* at 23a-24a. By dispensing with any such requirement, the court below misapplied the proper constitutional analysis and dramatically expanded the scope of this substantive due process right.

In *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir. 1997), for instance, the Sixth Circuit held that even where the plaintiff alleges "reprehensible" actions by government officials to cover up evidence in order to ward off a lawsuit, which "substantially prejudice [her] ability to recover in state court," such actions would not "amount[] to a constitutional violation" unless she can "show absolute denial from state court." *Swekel*, 119 F.3d at 1264. As the court explained its view of the need for such an "exhaustion" requirement:

> [Plaintiff,] however, never presented evidence that the state court could not adequately address these problems. In fact, none of the evidence before this court establishes that Swekel even attempted to go to the state court in the first instance. Before filing an

> "access to courts" claim, a plaintiff must make some attempt to gain access to the courts; otherwise, how is this court to assess whether such access was in fact "effective" and "meaningful"?

Id. The court therefore affirmed dismissal of the access-to-courts claim on the basis that to establish such a claim a plaintiff "cannot merely guess that a state court remedy will be ineffective," but must show that "the defendant's actions actually rendered any state court remedy ineffective." *Id.*

Likewise, in *Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998), the Ninth Circuit dismissed a right-of-access claim even where the plaintiffs *had* brought a wrongful death claim in the state courts, but had then filed suit in federal court claiming that their constitutional rights had been violated by law enforcement officers who tried to cover up their own involvement in a shooting. The court held that to present a valid claim, plaintiffs had to show that "the defendants' cover-up violated their right of access to the courts by rendering '*any* available state court remedy ineffective.'" *Id.* at 1222-23 (quoting *Swekel*, 119 F.3d at 1264) (emphasis added). The court concluded that because their "wrongful death action remains pending in state court, it is impossible to determine whether this has in fact occurred." 143 F.3d at 1223.

The court below purported to distinguish these cases, though its purported distinction threatens to expand the scope of this right even further. The gist of the court of appeals' position is that respondent stated a due process violation by alleging that, had she been fully informed about the situation, she could possibly have averted Bamaca's death by bringing a common-law tort claim for intentional infliction of emotional distress and seeking an emergency injunction to save his life before it was too late. On this basis, the court explained, she can plausibly claim that petitioners' alleged misrepresentations and concealments completely foreclosed her from pursuing this particular form of relief. *See* Pet. App. 24a-26a, 63a-64a.

Among other problems, this novel approach conflates two distinct points. By holding that respondent's constitutional

rights were infringed because she was hindered in pursuing a specific remedy, rather than that she was prevented from taking her claims to court, the court below fashioned a much broader constitutional entitlement: no longer is a plaintiff entitled only to exercise a "facilitative" right to *access* the courts, but he or she can now lay claim to secure a particular and most desirable outcome. *Cf. Lewis*, 518 U.S. at 354 (expressly rejecting suggestion that government officials must enable individuals "to *discover grievances*, and to *litigate effectively* once in court") (emphasis in original). As the Fifth Circuit put the matter in rejecting a claimed right of access resting on such broad allegations: "The constitutional right of access does not, however, guarantee one the right to have one's case proceed in a particular procedural posture *or the right to a particular form of relief*." *Crowder*, 884 F.2d at 813-14 (emphasis added).

The court below styled its approach as a "futility" exception, but that was a misnomer, as the conflicting rulings of the Sixth and Ninth Circuits aptly illustrate. *Both* cases require plaintiff to show that the defendant's actions actually rendered "any" state court remedy ineffective. *See Swekel*, 119 F.3d at 1264; *Delew*, 143 F.3d at 1222-23. The court below embraced the view that if *some particular remedy* were rendered ineffective, a valid constitutional claim is raised. The other courts have been far stricter in applying this "exhaustion" requirement – even "reprehensible" actions by government officials to cover up evidence in order to ward off a lawsuit, which "substantially prejudice [her] ability to recover in state court," do not amount to a constitutional violation unless she can "show *absolute denial* from state court." *Swekel*, 119 F.3d at 1264 (emphasis added); *see Delew*, 143 F.3d at 1223 (claim can proceed "if in fact the defendants' alleged cover-up actually rendered *all* state court remedies ineffective") (emphasis added). Accordingly, these courts hold that a plaintiff *must* "make some attempt to gain access to the courts" *before* "filing an 'access to courts' claim." *Swekel*, 119 F.3d at 1264; *Delew*, 143 F.3d at 1222-23. Here respondent failed to do so and thus failed to establish any valid due process claim.

The approach taken by the Sixth and Ninth Circuits represents the better view on this issue and is more consistent with this Court's precedents concerning due process and the right of access. It simply defies logic and analysis to hold as a matter of constitutional law that a claimant can establish a violation of the right of access without showing that she has actually been unable to access the courts.

Indeed, in *Parratt v. Taylor*, 451 U.S. 527 (1981), the Court held that a prisoner did not state a valid due process claim where adequate remedies were available to seek redress in the state courts, though he had not made use of them. The Court noted that this "procedure was in existence at the time of the loss here in question," and though "the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded [in federal court], that does not mean that the state remedies are not adequate to satisfy the requirements of due process," at least where the alleged deprivation did not occur pursuant to any established procedure. *Id.* at 543-44. The Court expressed special concern that any other result "would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the [Due Process Clause]." *Id. See also Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (holding that *Parratt* is applicable to intentional deprivations by government officials); *Lujan v. G&G Fire Sprinklers*, 121 S. Ct. 1446, 1450 (2000) (finding no due process violation where state withholds payment on contract because any such claim for payment "can be fully protected by an ordinary breach-of-contract suit").[6] Nor does respondent fare any better by framing the issue as one of substantive due process, for it is clear that a "mere pleading exercise" cannot be used to avoid the *Parratt* rule "by attaching a substantive, rather

[6] *Cf. Davis v. Passman*, 442 U.S. 228, 245 (1979) (recognizing *Bivens* claim for violation of the Due Process Clause only because "there are available no other alternative forms of judicial relief. For Davis, as for Bivens, 'it is damages or nothing.'") (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring)).

than a procedural, label to due process claims." *Albright*, 510 U.S. at 285 (Kennedy, J., concurring).

The *Parratt* line of decisions thus demonstrates a key error in the ruling below: the impairment of one kind of legal remedy does not violate due process where parties remain free to assert their claims and seek other relief, even though they may not view the alternative remedies as optimal. Indeed, the Due Process Clause protects only those "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," and does not otherwise limit inevitable policy choices about the specifics of adequate and appropriate procedures and remedies. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). This essential consideration is fully applicable here, as many alternative remedies may adequately redress the kinds of concerns raised by respondent's right-of-access claims.

Perhaps most important, the venerable doctrine of equitable tolling is typically available in all jurisdictions to preserve the underlying claims from expiration where a party could not reasonably have been expected to have discovered the correct state of affairs, such as where officials are alleged to have concealed material information.[7] In addition, many jurisdictions recognize either a distinct cause of action for intentional spoliation of evidence,[8] or impose liability for such conduct

[7] *See, e.g., Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1874) (undisputed doctrine in Anglo-American courts that cause of action is not be deemed to have accrued until fraud is discovered); *Exploration Co. v. United States*, 247 U.S. 435, 449 (1918) (describing "now almost universal" rule that limitations period "shall not begin to run until the discovery of the fraud"). It is worth noting that even if respondent had failed to file suit within a limitations period of general applicability, it is doubtful that due process would be violated. *See, e.g., Albright*, 510 U.S. at 285 (Kennedy, J., concurring); *Daniels v. Williams*, 474 U.S. 327, 342 (1986) (Stevens, J., concurring).

[8] *See, e.g., Holmes v. Amerex Rent-A-Car*, 180 F.3d 294 (D.C. Cir. 1999); *Coleman v. Eddy Potash, Inc.*, 905 P.2d 185 (N.M. 1995); *Smith v. Howard Johnson Co.*, 615 N.E.2d 1037 (Ohio 1993); *Hazen*

under the common law of torts.[9] *See, e.g.*, *Swekel*, 119 F.3d at 1264 (citing availability of such remedies); *id.* at 1265 (Merritt, J., concurring) ("We should not simply displace the normal state court remedies for spoliation or concealment of evidence or obstruction of state judicial proceedings with a new, expanded, loosely worded, federal constitutional tort"); *Foster v. City of Lake Jackson*, 28 F.3d 425, 431 n.9 (5th Cir. 1994) (same); *Ryland v. Shapiro*, 708 F.2d 967, 973 n.7 (5th Cir. 1983) (same). In instances where officials deliberately concealed or falsified evidence, federal officials may be exposed to a traditional *Bivens* claim for violating the Fourth Amendment, *see, e.g.*, *Albright*, 510 U.S. at 271-75 (Rehnquist, C.J.) (plurality opinion), and state and local officials may be subjected to corresponding liability under section 1983 or 1985 for conspiracy to violate civil rights, *see, e.g.*, *Bell v. City of Milwaukee*, 746 F.2d 1205, 1260 & n.69 (7th Cir. 1984). In pending actions, discovery tools and judicial sanctions can be used to redress any alleged misconduct. *See, e.g.*, *National Hockey League v. Metro Hockey Club*, 427 U.S. 639, 643 (1976) (per curiam) ("the most severe in the spectrum of sanctions" for discovery misconduct "must be available to the district court in appropriate cases" in order to punish and deter violations). Litigation that already has been pursued and terminated can be reopened where good reasons exist to justify relief from the operation of the judgment. *See, e.g.*, *Chambers v. Nasco, Inc.*, 501 U.S. 32, 44 (1991). Criminal sanctions and penalties for obstruction of justice, tampering with evidence, perjury, or other illegal acts also apply. *See, e.g.*, *Bell*, 746 F.2d

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v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986); *Bondu v. Gurvich*, 473 So. 2d 1307 (Fla. App. 1984), *review denied*, 484 So. 2d 7 (Fla. 1986).

[9] *See, e.g.*, *Rosenblit v. Zimmerman*, 766 A.2d 749 (N.J. 2001); *Boyd v. Travelers Ins. Co.*, 652 N.E.2d 267 (Ill. 1995); *Weigl v. Quincy Specialties Co.*, 601 N.Y.S.2d 774 (Sup. Ct. 1993); *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434 (Minn. 1990); *La Raia v. Superior Ct.*, 722 P.2d 286 (Ariz. 1986); *Henry v. Deen*, 310 S.E.2d 326 (N.C. 1984).

at 1223; *Ryland*, 708 F.2d at 969 & n.3. Once again, even if a complaining party may not view this array of alternative remedies as optimal, they are nonetheless adequate for constitutional purposes. *See Parratt*, 451 U.S. at 543-44.

Rather than require respondent first to file a lawsuit pressing her underlying claims – as she is actually doing now in this case under the Federal Tort Claims Act – the court of appeals was content to accept legal hypotheticals that border on the fantastic. Having ventured down this uncertain path, the court soon found itself enmeshed in a thicket of surmise. Indeed, respondent's contentions are so dubious that it is not even clear she can meet the minimal threshold for standing to bring suit, which in turn would doom her access-to-courts claim. *See* Pet. App. 47a n.4 ("A cover-up to conceal evidence cannot prejudice a plaintiff's access to courts if the cause of action contemplated is untenable from the outset.").

The Court has repeatedly instructed that the irreducible constitutional minimum of standing comprises three elements:

> (1) that the plaintiff have suffered an "injury in fact" – an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) that there be a causal connection between the injury and the conduct complained of – the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bennett v. Spear, 520 U.S. 154, 167 (1996). The Court has consistently applied the second and third components to dismiss claims that rest on speculation about the uncertain consequential actions of third parties. *See, e.g.*, *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973) (if mother of illegitimate child "were granted the requested relief, it would result only in the jailing of the child's father. The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed

only speculative"); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 43 (1976) (causation and redressability prongs not satisfied where it is "speculative at best" to infer that "hospitals are so financially dependent upon the favorable tax treatment afforded charitable organizations that they would admit respondents if a court required such admission as a condition to receipt of that treatment").

The linchpin of respondent's claim for right of access to the courts was the supposition that but for the alleged concealment or deception, she would have effectively sought judicial action that could have prevented her husband's death. *See* Pet. App. 24a-25a, 64a; J.A. 50-51. Closer examination of this blithe skein of conjecture reveals its extreme tenuousness and illustrates the great potential for mischief in such a broad formulation of the constitutional claim. Embedded in the opinion of the court below is a series of speculations about future events, legal matters, and the conduct of third persons, all of which stretch constitutional standing requirements far past their breaking point.[10]

Indeed, the prospect that judicial action could have saved the life of respondent's husband – which was the key premise of the ruling below – is far more remote than the scenarios rejected in *Simon* and *Linda R.S.* Here respondent claims that if petitioners had promptly disclosed the information they allegedly possessed, she "could have sought an emergency injunction based on an underlying tort claim for intentional infliction of

[10] It is well established that at this threshold stage, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss, we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quotation omitted). There is a difference, however, between crediting factual allegations – even the most general factual allegations – and indulging in unsupported assumptions about future contingencies, particularly those based in part on ascertainable legal requirements. If there were not, the causation and redressability components of standing would be meaningless.

emotional distress." Pet. App. 24a; *see also id.* at 63a-64a. In uncritically accepting this claim, the court of appeals failed to examine the tortuous relation between her alleged injury – being misinformed about the government's knowledge of Bamaca – and the possibility that an American court would have issued an injunction that would have prevented his death.

Respondent's ill-defined claim would have been brought in federal court under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80 (FTCA), or if filed in state court against federal officials would have been removable to federal court, *see* 28 U.S.C. §§ 1442, 2679(d)(2), and the United States would have been substituted for the federal officials as the defending party, *see id.* [11] Once that occurred, to the extent respondent was asserting claims that either involve "a discretionary function" or "arise in a foreign country," they would have been dismissed under sovereign immunity. 28 U.S.C. §§ 2680(a), (k). If her lawsuit had somehow managed to survive these obstacles, then her motion for injunctive relief based only on tort claims (rather than any federal statute or constitutional provision) would itself have been barred by sovereign immunity and principles of federal supremacy. *See, e.g.*, *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (injunctive relief barred where it would "interfere with the public administration" or its effect would be "to restrain the Government from acting, or to compel it to act") (quotations omitted); *Malone v. Bowdin*, 369 U.S. 643, 645-48 (1962) (same); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 692-705 (1949) (same); *cf. Zschernig v. Miller*, 389 U.S. 429, 432-41 (1968) (application

[11] The Attorney General's certification that the United States should be substituted as the defending party turns on a determination that the official "was acting within the scope of his office or employment at the time," 28 U.S.C. § 2679(d)(1), and this decision itself is subject to judicial review. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995). In this case, however, the point would be established by respondent's claims that petitioners were acting pursuant to longstanding government policies and practices in dealing with information about covert activities. *See, e.g.*, J.A. 27-28, 37.

of state probate law held to be invalid intrusion on federal authority over foreign affairs and international relations).

Finally, even if, for some inexplicable reason, a court put all these problems to one side and granted the requested injunction to bar the relevant federal officials from participating in the alleged mistreatment of her husband, it is still highly doubtful whether that judicial order would have prevented the Guatemalan soldiers from killing him. *See, e.g.*, Pet. App. 70a (Henderson, J., dissenting from denial of reh'g) ("No United States court could reach the alleged tortfeasors, Guatemalan nationals on Guatemalan soil, in order to prevent their killing Harbury's husband, another Guatemalan national."); *see also Lujan*, 504 U.S. at 562 (noting standing problems where "one or more of the essential elements of standing 'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict'") (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (Kennedy, J.; plurality opinion)). In the end, the extent of speculation at even this one final step is too great to satisfy the causation and redressability prongs of standing doctrine as applied in the Court's prior cases. *See, e.g.*, *Simon*, 426 U.S. at 43; *Linda R.S.*, 410 U.S. at 618.

None of these manifold problems would arise under the more logical and judicious approach taken by those circuits that incorporate an "exhaustion" requirement in their formulation of the due process claim. As noted, the district court adopted the stricter approach endorsed by the Sixth and Ninth Circuits, holding that respondent's claim must be dismissed because she did not allege that she had ever tried to bring an action and been hindered in doing so. *See* Pet. App. 45a-46a & n.2. The court of appeals jettisoned that requirement, and therefore reversed and reinstated her claim. *See id.* at 23a-26a. This was error, especially since respondent's right-of-access claim so plainly relies "on little more than the remote possibility, unsubstantiated by allegations of fact, that [her] situation might have been better had [petitioners] acted otherwise, and might improve were the

court to afford relief." *Warth v. Seldin*, 422 U.S. 490, 507 (1975) (dismissing claims for lack of standing).

As the Court has emphasized, the Due Process Clause simply was never intended to create "a font of [federal] tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976). Although respondent may have various grievances, she simply cannot be said to have been denied "access" to the courts. In this case, in fact, she was never actually barred from the courts; she could have filed one or several lawsuits at any time, she could have pursued her FOIA action sooner, and in this very proceeding she continues to press causes of action for negligent supervision and intentional infliction of emotional distress under the FTCA. *See* J.A. 10-14; *see also supra* pages 7-8. Accordingly, respondent has no valid due process claim.

C. Respondent Has No Cognizable *Bivens* Action.

Earlier this Term, the Court reiterated its longstanding "caution toward extending *Bivens* remedies into any new context, a caution consistently and repeatedly recognized for three decades." *Correctional Servs. Corp. v. Malesko*, 122 S. Ct. 515, 523 (2001). The Court recognized that its "authority to imply a new constitutional tort [is] not expressly authorized by statute," *id.* at 519, and noted it had steadily "retreated from our previous willingness to imply a cause of action where Congress has not provided one" casts doubt on any efforts to expand upon its *Bivens* jurisprudence. *Id.* at 519 n.3; *see also id.* at 524 (Scalia, J., concurring) ("There is even greater reason to abandon [implied causes of action] in the constitutional field, since an 'implication' imagined in the Constitution can presumably not even be repudiated by Congress."); *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988) ("Our more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts.").

Here, respondent has asserted her novel substantive due process claim by means of a *Bivens* action. Yet no such cause of action has ever been approved by the Court. The only case in which the Court has upheld a *Bivens* claim based on an

alleged violation of the Due Process Clause is *Davis v. Passman*, 442 U.S. 228 (1979). In that case, however, the context of the claim was quite different: the plaintiff sought to sue the Congressman who had been her former employer under the equal protection component of the Fifth Amendment's Due Process Clause, in order to recover damages based on sexual discrimination. *See id.* at 230-32. There the Court inferred a new right of action "chiefly because the plaintiff lacked any other remedy for the alleged constitutional deprivation." *Malesko*, 122 S. Ct. at 520; *see also Davis*, 442 U.S. at 230-33 & n.4. Accordingly, the holding in *Bivens* should not be extended to authorize the newfangled cause of action that respondent asserts here. Moreover, in the circumstances of this case respondent does not lack for other remedies and legal and administrative processes, which in fact she continues to pursue. *See supra* Part I.B.

In addition to its general caution in inferring *Bivens* claims, the Court has also instructed on many occasions that a *Bivens* remedy will not be authorized in any case that presents "special factors counseling hesitation in the creation of a new remedy." *Bush v. Lucas*, 462 U.S. 367, 380 (1983); *Chilicky*, 487 U.S. at 423; *FDIC v. Meyer*, 510 U.S. 471, 486 (1994). Here there are no fewer than *three* "special factors" that weigh against authorizing a *Bivens* action as framed by respondent.[12]

First, the Congress has created an elaborate statutory mechanism for seeking information from the federal government, including detailed avenues for obtaining judicial relief and forceful sanctions against government officials who improperly withhold requested information. *See* Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"). In both *Bush* and *Chilicky*, the Court held that any such comprehensive regulatory scheme which provides meaningful, even if incomplete, relief for alleged constitutional deprivations precludes the courts from

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[12] Petitioners do not take issue with the Court's holding in *Carlson v. Green*, 446 U.S. 14 (1980), that the existence of the Federal Tort Claims Act itself is not a "special factor" that would justify declining to recognize a *Bivens* action. *See id.* at 19-23.

fashioning an additional *Bivens* remedy. This approach is premised on "appropriate judicial deference to indications that congressional action has not been inadvertent." *Chilicky*, 487 U.S. at 423; *see also id.* at 420-29; *Bush*, 462 U.S. at 374-90. The FOIA is doubtless such a scheme.

The FOIA "is fundamentally designed to inform the public about agency action." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 144 n.10 (1975); *see also Dep't of the Air Force v. Rose*, 425 U.S. 352, 360 (1976) (same). Congress consciously built from the ground up and expressly sought to establish "the basic principle of a public records law by making the records available to any person." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 9 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2426. Accordingly, the general rule under the FOIA is that federal agency records are subject to full disclosure, *see* 5 U.S.C. § 552(a)(3), though the Act also recognizes that agencies may often have a legitimate, indeed overriding, justification for withholding information from public scrutiny and provides a list of nine exclusive exemptions for that purpose, *see* § 552(b). These statutory exemptions thus represent a very careful balance struck by Congress "'between the right of the public to know and the need of the Government to keep information in confidence.'" *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (quoting H.R. Rep. 89-1497, *supra*, at 6); *see also Baldrige v. Shapiro*, 455 U.S. 345, 352 (1982) ("public disclosure is not always in the public interest.").

The FOIA also includes an intricate series of provisions that specify an agency's duty to respond to requests for information, including mandatory deadlines, *see* 5 U.S.C. § 552(a)(6)(A), expedited treatment where appropriate, *see id.* § (a)(6)(E), and a *de novo* judicial review process in which the agency bears the burden to justify nondisclosure, *see id.* § (a)(3). If the requesting parties prevail in court, they can recover attorney fees and other litigation costs. *See id.* § (a)(4)(E). Finally, Congress provided strong disciplinary measures against officials who "acted arbitrarily or capriciously" in withholding information. *Id.* § (a)(4)(F); *see* 5 U.S.C. § 1216(a)(3). This detailed set of rights, remedies, and procedures for addressing

claims that officials are improperly withholding access to information constitutes "an elaborate comprehensive scheme that encompasses substantive provisions forbidding arbitrary action . . . and procedures – administrative and judicial – by which improper action may be redressed." *Bush*, 462 U.S. at 385.[13]

The Court has also made clear that in considering the extraordinary step of creating an additional judicial remedy, it is of no moment that Congress has not provided in the FOIA for every possible manner and mechanism of relief. *See Chilicky*, 487 U.S. at 425 (*Bivens* remedy is not implied where Congress established statutory remedial scheme to handle particular category of disputes with the government, even where alleged constitutional injury would otherwise "go unredressed"); *see also Bush*, 462 U.S. at 378 (stating it is irrelevant to the *Bivens* analysis whether Congress has "expressly den[ied] petitioner the judicial remedy he seeks or [provided] him with an equally effective substitute"). The pertinent question in determining the propriety of an additional *Bivens* remedy is rather whether "Congress has provided what it considers *adequate remedial mechanisms* for constitutional violations." *Chilicky*, 487 U.S. at 423 (emphasis added). Here the court of appeals found that only one small corner of the remedial field – a possible injunction ancillary to a state tort claim for intentional infliction

[13] It bears mention that respondent has vigorously pursued this avenue of relief: she filed FOIA requests with the respective agencies in January 1995 and acknowledges that "expedited processing was granted in light of the emergency situation." J.A. 34-35; *see also* Pet. App. 4a. Although she "received no documents of any kind in the following months," J.A. 35, since then she has filed two lawsuits in federal court to press her FOIA requests, and after receiving thousands of pages of documents containing the very information she had sought (as she now acknowledges, *see* Cert. Opp. 19 n.4), she has voluntarily dismissed both actions. *See Harbury v. CIA*, No. 95-CV-1431 (D.D.C. filed July 31, 1995; stipulation of dismissal filed Jan. 28, 1999); *Harbury v. Department of State, et al.*, No. 97-CV-305 (D.D.C. filed Feb. 14, 1997; stipulation of dismissal filed Jan. 28, 1999).

of emotional distress – might possibly be left uncovered in the absence of a *Bivens* remedy. *See* Pet. App. 24a-25a. Yet this is exactly the sort of judicial gap-filling that this Court has repeatedly explained is an inappropriate foundation for a *Bivens* action.[14]

A second "special factor counseling hesitation," *Bivens*, 403 U.S. at 396, is that allowing *Bivens* actions like this one to proceed would create a "potentially enormous financial burden for the Federal Government." *Meyer*, 510 U.S. at 486; *see also United States v. Standard Oil Co.*, 332 U.S. 301, 311 (1947). Over the years, the Court has shown great reluctance to authorize any monetary recovery for misrepresentations made by government officials. Indeed, in reviewing rulings by the lower courts that have upheld claims of estoppel against the government, the Court has never failed to reverse, often summarily. *See, e.g.*, *INS v. Hibi*, 414 U.S. 5 (1973) (per curiam); *Schweiker v. Hansen*, 450 U.S. 785 (1981) (per curiam); *INS v. Miranda*, 459 U.S. 14 (1982) (per curiam). And Congress has evinced the same concern in the FTCA, which "by its terms excludes both negligent and intentional misrepresentation claims from its coverage." *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 429-30 (1990) (citing 28 U.S.C. § 2680(h)). What the Court said there is equally germane here: "We would be most hesitant to create [a cause of action] that would nullify a congressional decision against authorization of the same class of claims." *Id.* at 430.

In the *Richmond* decision, the Court further clarified that any claim for money from the Public Treasury contrary to a statutory appropriation is prohibited by the Appropriations

[14] As the Court has pointed out in a related context: "The natural consequence of a rule that [imposed liability] for the statements of [government officials] would be a decision to cut back and impose strict controls on Government provision of information in order to limit liability. . . . The inevitable fact of occasional individual hardship cannot undermine the interest of the citizenry as a whole in the ready availability of Government information." *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 433-34 (1990).

Clause of the Constitution, Art. I, § 9, cl. 7. *See* 496 U.S. at 424-29. The Court quoted Judge Friendly's observation that it "ignores reality to expect that the Government will be able to 'secure perfect performance from its hundreds of thousands of employees scattered throughout the continent.'" *Id.* at 433 (quoting *Hansen v. Harris*, 619 F.2d 942, 954 (2d Cir. 1980) (Friendly, J., dissenting), *rev'd sub nom. Schweiker v. Hanson*, 450 U.S. 785 (1981)). The Court's conclusion on this point is particularly apt in the circumstances here as well:

> To open the door to [such] claims would only invite endless litigation over both real and imagined claims of misinformation by disgruntled citizens, imposing an unpredictable drain on the public fisc. Even if most claims were rejected in the end, the burden of defending such . . . claims would itself be substantial.

Richmond, 496 U.S. at 433. Thus the Court again should "leave it to Congress to weigh the implications of such a significant expansion of Government liability." *Meyer*, 510 U.S. at 486.

A third and very significant "special factor" here is that respondent's suit would require judicial interference with the conduct of foreign affairs and covert quasi-military operations of extreme sensitivity. Indeed, the Court has indicated that the potential to "significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest" is a distinct special factor that counsels hesitation in creating a *Bivens* remedy. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273-74 (1990); *see also Chappell v. Wallace*, 462 U.S. 296, 303-04 (1983) (refusing to imply *Bivens* action because of "special status of the military" and "special nature of military life"); *United States v. Stanley*, 483 U.S. 669, 683 (1987) (refusing to imply *Bivens* action because "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate").

In this case, the allegations in respondent's *Bivens* action raise issues about whether the highest-ranking State Department and NSC officials may legitimately withhold information from her – even if necessary through deception – about their

knowledge concerning covert operations amidst a civil war in a foreign country. That is not the sort of question that should be lightly committed to resolution by the judicial branch.[15] Accordingly, the Court should conclude that respondent cannot assert a valid *Bivens* claim in the circumstances of this case.

II. THE COURT SHOULD UPHOLD THE DEFENSE OF QUALIFIED IMMUNITY HERE EVEN IF IT RECOGNIZES THIS CONSTITUTIONAL CLAIM FOR THE FIRST TIME IN THIS CASE.

The ruling below misapplies the doctrine of qualified immunity that the Court has extended to government officials. The constitutional issue raised here has never been addressed by the Court; has not been definitively determined by the lower courts; presents a hotly disputed question on the merits; and certainly had not been "clearly established" adversely to petitioners at the time they acted. In this posture, the Court's precedents uniformly uphold petitioners' defense of qualified immunity.

A. Qualified Immunity Shields Officials from Liability Where the Unlawfulness of Their Conduct Was Not Clear from Preexisting Law.

The Court's decisions have long settled that government officials performing discretionary functions are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Davis v. Scherer*, 468 U.S. 183, 195 (1984); *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). To defeat a defense of qualified immunity, the

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[15] It is also pertinent that one of the FOIA's carefully considered exemptions that justifies nondisclosure of information is where the requested document is classified "by an Executive order to be kept secret in the interests of national defense or foreign policy." *See* 5 U.S.C. § 552(b)(1).

constitutional right alleged to be violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," which requires that "in the light of preexisting law, the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640.

This doctrine serves to alleviate concern that the threat of personal liability for money damages would "'dampen the ardor of all but the most resolute or the most irresponsible'" public officials. *Harlow*, 457 U.S. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), *cert. denied*, 339 U.S. 949 (1950)). Shielding officials from lawsuits that may distract them from their governmental duties has been judged necessary and appropriate to "encourag[e] the vigorous exercise of official authority." *Butz v. Economou*, 438 U.S. 478, 506 (1978); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

To this end, the Court has developed an objective test for determining whether the law existing at the time "clearly established" that such conduct was prohibited. First, the right at issue must be defined with reasonable particularity, which means that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that, in the light of preexisting law, the unlawfulness must be apparent." *Id.*; *see also Saucier v. Katz*, 121 S. Ct. 2151, 2155-57 (2001) (alleged right must be formulated "on a more specific level"); *Wilson v. Layne*, 526 U.S. 603, 615 (1999). In making this determination, which is a pure question of law, a court should "use its 'full knowledge of its own [and other relevant] precedents,'" *Elder v. Holloway*, 510 U.S. 510, 516 (1994), and thus it is proper to look first to "the opinions of this Court, of the Courts of Appeals, or of the local District Court" that existed at the time of the challenged conduct. *Procunier v. Navarette*, 434 U.S. 555, 565 (1978); *see also Scherer*, 468 U.S. at 192 & n.9.

Above all, the Court has stressed that officials cannot "reasonably have been expected to be aware of a constitutional right that had not yet been declared." *Procunier*, 434 U.S. at 565. "Such hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Mitchell*, 472 U.S. at 535. "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818. For these reasons, "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. The importance of close adherence to these principles is manifest in an area where the Court has stressed that qualified immunity is an "*immunity from suit* rather than a mere defense to liability," which is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526 (emphasis in original).

The court of appeals did not correctly apply these governing principles. No controlling authority from this Court or from the court below even hinted that petitioners' conduct would violate respondent's constitutional right of access to the courts as of 1993 and 1994. Shortly before, the state of the law in other jurisdictions had been accurately described as "nebulous." *Crowder*, 884 F.2d at 811. And in the years since, the range of disagreement has increased rather than narrowed, a fact which itself compels a finding of qualified immunity. *See Mitchell*, 472 U.S. at 535; *Wilson*, 526 U.S. at 618.

The court of appeals committed two major errors that affected its decision. *First*, it failed to come to grips with lower court precedents from other jurisdictions that had rejected access-to-courts claims in similar circumstances. *See infra* Part II.B. *Second*, in trying to show that the law was "clearly established" in favor of respondent's access-to-courts claim, the court of appeals relied heavily on decisions that postdated the events in question. *See id.* That was wholly improper, since officials lose the shield of qualified immunity only when the unconstitutionality of their conduct would have been apparent

"in the light of pre-existing law." *Anderson*, 483 U.S. at 640; *see also Harlow*, 457 U.S. at 818; *Malley*, 475 U.S. at 341.

B. At the Time Petitioners Acted, the Lower Courts Had Not Settled the Due Process Issue.

In this case, respondent has not cited "any cases of controlling authority in [her] jurisdiction at the time of the incident which clearly established the rule on which [she seeks] to rely." *Wilson*, 526 U.S. at 617. Accordingly, petitioners are entitled to qualified immunity unless respondent can identify "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful." *Id.* No such consensus has ever existed on the due process issue raised in this case.

At the time petitioners acted, in 1993 and 1994, the scanty case law in the lower courts had not definitively resolved the constitutional issues raised in this case – and none of those cases had considered these issues in the unusual circumstances presented here. The panel decision below (and the panel's further explication when it denied rehearing) cite a total of seven circuit court decisions that have addressed some version of the constitutional question presented here, a majority of which did not even find a constitutional violation. *See* Pet. App. 21a-22a; *see also id.* at 66a-67a. Only four of those decisions were issued prior to the actions at issue in this case, and not only are they readily distinguishable, but they simply cannot be said to constitute a clear "consensus of cases of persuasive authority such that a reasonable officer *could not have believed* that his actions were lawful" in the circumstances of this case. *Wilson*, 526 U.S. at 617 (emphasis added).

In *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), the court upheld a right-of-access claim, among other claims of conspiracy to violate civil rights, but expressly limited its holding "to the particularly egregious set of facts herein," in which one of the police officers was convicted of homicide, several officers confessed to having committed perjury and obstruction of justice, and much of their criminal misconduct was specifically found to have been motivated by racial

discrimination. *Id.* at 1264-65; *see also id.* at 1214-22. Likewise, in *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986), the court found a constitutional violation where defendants allegedly suborned perjury and obstructed discovery, conduct that itself "was also a crime." *Id.* at 573. Even for such egregious conduct, however, the court also noted that "the alleged conduct *wholly* deprived the estate of its causes of action against federal defendants" and thus "cannot be termed a mere alteration of remedies or forms of recovery," but constituted an absolute denial of access to vindicate the plaintiff's rights. *Id.* at 578 (emphasis added).

The facts of these two cases, along with the express judicial caveats about how to conceptualize and apply the alleged right of access, place these decisions at a considerable distance from the instant case. Here petitioners are not even alleged to have committed any crime or to have engaged in nefarious conduct, there are obvious and weighty justifications for their conduct even if it were as alleged, and it is plain that their alleged actions have *not* deprived respondent of all avenues of administrative and judicial relief. Certainly it cannot be maintained that the courts in those cases upheld constitutional violations "under facts not distinguishable in a fair way from the facts presented in the case at hand." *Saucier*, 121 S. Ct. at 2157.

The other two cases, both from the Fifth Circuit, further illustrate the lack of uniformity among the lower courts on the constitutional issue at the time of petitioners' alleged actions. In *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), the court stated that interference with access to the courts "may by itself amount to a constitutional deprivation (unless reasonably justified by a countervailing state interest)." *Id.* at 975. But the court did not examine in any detail the kinds of situations in which this would be so, or in which officials would be judged to have presented an adequate countervailing justification for their conduct. Moreover, the court explicitly noted that defendants may be entitled to qualified immunity against such a claim. *See id.* at 975-76. To the extent that *Ryland* is offered as having firmly established the Fifth Circuit's position in support of the constitutional violation alleged in *this* case, however, that ruling

was directly undermined by *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989). The *Crowder* court held that no constitutional deprivation had occurred because the right of access is merely "a facilitative right" and thus could not be invoked where the complaining parties "had 'access' to the Texas courts" at all times. *Id.* at 814. Indeed, the court commented that "the current contours of the right can best be described as nebulous," *id.* at 811, and framed the alleged right of access quite narrowly, in terms of wrongful and intentional concealment of crucial information solely "for the purpose of frustrating that right," *id.* at 812. The court also specifically held that any such right of access does *not* "guarantee one the right to have one's case proceed in a particular procedural posture or the right to a particular form of relief." *Id.* at 814. Far from firmly establishing the right of access as formulated by the court below, these distinctions directly undermine that formulation.

Moreover, in a later decision the Fifth Circuit upheld qualified immunity against an access-to-courts claim in a decision issued just after the events of this case. *See Foster v. City of Lake Jackson*, 28 F.3d 425 (5th Cir. 1994). The court "question[ed] *Bell*'s reliance on *Ryland* for any broader definition of [the] right of access," and framed the right in terms of an ability "to institute suit," thus reaffirming the exhaustion requirement. *Id.* at 430 n.7. Indeed, it is telling that a recent district court case from the Fifth Circuit construed *Foster* as having "clarified that if Plaintiff is able to file suit, the right is simply not implicated," and explicitly criticized the ruling below *in this very case* as "giving the right of access to courts a broader definition than that recognized in this circuit." *Ellis v. Magee & Devereux*, 2001 WL 167744, at *2 & n.3 (E.D. La. Feb. 15, 2001). Although these subsequent decisions do not directly show what the law was at the time of the events in question, they do demonstrate that the Fifth Circuit's prior decisions cannot properly be read as endorsing the more expansive due process holding rendered by the court below.

In response to the dissenting judges' criticism of the circuit court cases that were cited in opposition to qualified immunity, *see* Pet. App. 70a-71a, the panel relied, erroneously, on other

decisions that *postdated* the events in question. Three of the cases cited, *see* Pet. App. 66a-67a, were not even issued until *after* the events at issue here had occurred.

The use of subsequent decisions to invalidate petitioners' defense of qualified immunity was plainly improper, as the Court's precedents make clear. In *Mitchell*, for example, federal officials were alleged to have wrongfully authorized a wiretap on the plaintiff's telephone. Two years after those actions had taken place, the Supreme Court had ruled that such conduct was unlawful and violated the Fourth Amendment. *See United States v. United States Dist. Ct.*, 407 U.S. 297 (1972). At the time of the acts at issue, however, the law was not clearly established on this point. *See Mitchell*, 472 U.S. at 533. The Court thus upheld the claim of qualified immunity, stating that "officials performing discretionary functions are not subject to suit when such questions are resolved against them only after they have acted," for this "hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Id.* at 535. "The decisive fact," the Court wrote, "is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted," as shown by the fact that the Court itself intervened to decide the issue two years later. *Id.*

Moreover, even on their own terms, these later circuit court decisions only serve to undermine the notion that the law has ever been "clearly established" along anything like the lines stated by the court below. In particular, both the Sixth Circuit's 1997 decision in *Sweckel* and the Ninth Circuit's 1998 decision in *Delew* ordered dismissal of right-of-access claims because both courts held that any such claim incorporates a strict "exhaustion" requirement. *See Swekel*, 119 F.3d at 1264 (even "reprehensible" actions by government officials to cover up evidence in order to ward off a lawsuit, which "substantially prejudice [her] ability to recover in state court," do not amount to a constitutional violation unless she can "show *absolute denial* from state court") (emphasis added); *Delew*, 143 F.3d at 1223 (claim can proceed only "if in fact the defendants' alleged cover-up actually rendered *all* state court remedies ineffective") (emphasis added). Accordingly, both of these courts hold that

a plaintiff *must* "make some attempt to gain access to the courts" *before* "filing an 'access to courts' claim." *Swekel*, 119 F.3d at 1264; *see Delew*, 143 F.3d at 1222-23. In sharp contrast, as described in Part I.B, *supra*, the court below parted company with its sister circuits on this key point, which was dispositive of the claims in both cases. These later cases not only fail to support the court of appeals' *rejection* of qualified immunity, but they reflect just the kind of discord among the lower courts that *compels* a finding of qualified immunity. *Wilson*, 526 U.S. at 618 ("If judges thus disagree on a constitutional question, it is unfair to subject [public officials] to money damages for picking the losing side of the controversy.").

The final case cited in the ruling below was *Vasquez v. Hernandez*, 60 F.3d 325 (7th Cir. 1995), which casts additional doubt on respondent's position on qualified immunity. In that case, the court also denied the proffered right-of-access claim, notwithstanding that defendants had engaged in "inexcusable" conduct intended solely to cover up wrongdoing, because "the cover-up failed to achieve such ends." *Id.* at 329. The Seventh Circuit also went out of its way expressly to underscore that its holding in *Bell* "was motivated in particular by the egregiousness of the police conduct in that case" and thus should not be read broadly. *Id.* Once again, therefore, these developing trends in the lower courts tend to weaken, rather than strengthen, any argument against qualified immunity here.

In sum, the Court has emphasized that public officials "cannot be expected to predict the future course of constitutional law." *Procunier*, 434 U.S. at 562. The Court has steadfastly reaffirmed this admonition, noting that "[t]he qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam summary reversal) (quoting *Malley*, 475 U.S. at 343, 341). The "nebulous" state of the law in the lower courts on the right-of-access issue, *Crowder*, 884 F.2d at 811, amply supports petitioners' defense of qualified immunity here.

C. Respondent's Alleged Right-of-Access Claim Is Not Clearly Established Even Today.

It is, at a minimum, very far from obvious even now that petitioners' conduct violated any clearly established constitutional rights. The most direct indication of this uncertainty is the Court's decision to grant *certiorari* and decide the constitutional issue in this case, which had spawned conflicting decisions in the courts below. *See Mitchell*, 472 U.S. at 534 (finding it significant for purposes of qualified immunity that "this Court found the issue sufficiently doubtful to warrant the exercise of its discretionary jurisdiction" to decide it and give it "the definitive answer that it demanded"). And Part I, *supra*, discusses in detail all the reasons why respondent's claims are not actionable in the first instance. Certainly "the constitutional question presented by this case is by no means open and shut." *Wilson*, 526 U.S. at 615.

In fact, the lower courts are still divided on the underlying constitutional issue, eight years after the events that gave rise to this case. The district court noted that the lower courts disagree on the constitutional merits (*see id.* at 46a & n.2), which were also disputed within the *en banc* court below, *see id.* at 70a-71a (Henderson & Sentelle, JJ., dissenting from denial of rehearing *en banc*). All of this division and uncertainty more than suffice to justify petitioners' defense of qualified immunity here. *See, e.g., Wilson*, 526 U.S. at 618; *Procunier*, 434 U.S. at 562.

The doctrine of qualified immunity is designed to allow public officials to carry out their duties with "the decisiveness and the judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974); *see also Wood v. Strickland*, 420 U.S. 308, 321 (1975) (qualified immunity ensures that public officials "need not exercise their discretion with undue timidity"). Only by faithful application of these settled principles can government officials "reasonably anticipate when their conduct may give rise to liability for damages" and tailor their behavior accordingly. *Scherer*, 468 U.S. at 195. The Court has consistently held that officials cannot be held personally liable in damages where they simply make wrong guesses in gray areas

of the law, rather than transgressing bright lines, for qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

In the circumstances of this case, petitioners cannot plausibly be placed in either category. That is especially true in view of the sensitive subject matter implicated here, which touched on delicate matters of relations with a foreign government and intervention in its quasi-military affairs. In this context, in particular, the district court found itself unable to conclude that petitioners "would have reasonably known that they [had to] be forthcoming in discussing the intelligence that they had received about Bamaca." Pet. App. 48a. That decision is undoubtedly correct, and therefore petitioners are entitled to qualified immunity here.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, and the case remanded with instructions to dismiss the remaining *Bivens* claim brought against petitioners.

Respectfully submitted,

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No. 01-394

IN THE

Supreme Court of the United States

WARREN CHRISTOPHER, MARILYN McAFEE, ALEXANDER WATSON, ANNE PATTERSON, PEG WILLINGHAM, ANTHONY LAKE, and RICHARD E. FEINBERG,
Petitioners,

vs.

JENNIFER K. HARBURY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

BRIEF FOR RESPONDENT

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Questions Presented

1. If United States officials first offer assistance, then affirmatively deceive, a citizen in order to prevent her from proceeding to federal court for emergency injunctive relief to save her husband from torture and imminent extrajudicial execution at the hands of CIA operatives, has the constitutional right to access to the courts been violated?

2. If United States officials did engage in such conduct, did they violate clearly established law so as to prevent qualified immunity?

Table of Contents

Page(s)

Questions Presented i

INTRODUCTION 1

STATEMENT OF THE CASE 2

PROCEEDINGS BELOW 5

SUMMARY OF THE ARGUMENT 7

ARGUMENT 10

I. ACCESS TO COURTS 10

A. Ms. Harbury's Claims Are Based Upon Affirmative Efforts to Deceive, Not the Failure to Affirmatively Inform; and Ms. Harbury Had the Right to Rely Upon the Truthfulness of Government Statements 17

B. In 1993, Ms. Harbury Could Have Filed Suit In Federal District Court For Emergency and Declaratory Relief. These 1993 Causes of Action are Concrete and Not Conjectural. 22

1. Violation of Ms. Harbury's Fifth Amendment Rights 24

2. Violation of Ms. Harbury's Constitutional Family Rights 26

3. Conspiracy to Commit Assault and Battery 27

4. Relief Sought 31

5. Injunctive Relief Would Have Been Effective and Appropriate 32

C. Ms. Harbury Is Not Required to First Proceed to State Court 33

D. The Potential For a Monetary Award After Mr. Bamaca's Murder Is Not An "Adequate Remedy" With Regards to Ms. Harbury's Claim For Denial of Access to the Courts 35

E. Ms. Harbury's Claims Are Not Barred By the Doctrine of Parratt v. Taylor 38

F. A Remedy For the Access to Courts Violation Presented Here Will Not Interfere With Foreign Affairs or Otherwise Chill Any Discretionary Functions of Government Officials 40

G. A Bivens Remedy Is Fully Appropriate Here; The FOIA System Provides No Adequate Cause of Action or Remedy 43

II. THE CONSTITUTIONAL RIGHT AT ISSUE WAS CLEARLY ESTABLISHED; AND QUALIFIED IMMUNITIES DO NOT APPLY 47

CONCLUSION 50

Appendix A A-1

Appendix B B-1

Appendix C C-1

TABLE OF AUTHORITIES

Page(s)

CASES

Anderson v. Creighton,
483 US. 635 (1987) 47, 48

Arizona v. Maypenny,
451 U.S. 232 (1981) 28

Barrett v. United States,
798 F.2d 565 (2d Cir. 1986) 14, 19, 49

Beacon Theaters v. Westover,
359 U.S. 500 (1959) 36

Bell v. City of Milwaukee,
746 F.2d 1205 (7th Cir. 1984) ..... passim

Bill Johnson's Restaurants, Inc. v. NLRB,
461 U.S. 731 (1983) 33

Bivens v. Six Unknown Agents of the Federal Narcotics Bureau,
403 U.S. 388 (1971) 28, 43, 45, 46

Boddie v. Connecticut,
401 U.S. 371 (1970) 11,12,26

Bounds v. Smith,
430 U.S. 817 (1977) 7, 11, 13

Brady v. Maryland,
373 U.S. 83 (1963) 7, 13

Bush v. Lucas
462 U.S. 367 (1983) 45, 46

Butz v. Economou,
438 U.S. 478 (1978) 47

Carlson v. Green,
446 U.S. 14, (1980) 44

Chambers v. Baltimore& Ohio R.R.,
207 U.S. 142 (1907) 7, 10, 38

Chappell v. Wallace,
462 U.S. 296, (1983) 45, 46

Clark v. Library of Congress,
750 F.2d 89 (D.C.Cir. 1984) 33

Cobell v. Norton,
240 F.3d 1081 (D.C. Cir. 2001) 31

Conley v. Gibson,
355 U.S. 41(1957) 15, 41

Correctional Services Corp. v. Malesko,
122 S.Ct. 515 (2001) 44, 47

Culumbe v. Connecticut,
367 U.S. 568 (1961) 30

Davis v. Passman,
442 U.S. 228 (1979) 43-44

Delew v. Wagner,
143 F.3d 1219 (9th Cir. 1998) 14, 34, 35, 37

Dreyer v. Jalet
349 F.Supp. 452 (S.D. Tex. 1972) 36

DRG Funding Corp. v. Secretary of Housing and Urban Development
76 F.3d 1212 (D.C. Cir. 1996) 31

Elder v. Holloway,
510 U.S. 510 (1994) 47

Ex Parte Hull,
312 U.S. 546 (1941) 7, 11, 12

Federal Deposit Insurance Corp. v. Meyer,
510 U.S. 471 (1994) 44

Gideon v. Wainwright,
372 U.S. 335 (1963) 11

Giglio v. United States,
405 U.S. 150 (1967) 13

Griswold v. Connecticut,
381 U.S. 479 (1965) 26

Halberstam v. Welch,
705 F.2d 472 (D.C. Cir. 1980) 27

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 47, 48

Hohri v. United States,
782 F.2d 227(D.C.Cir. 1986) 19

Honig v. Doe ,
484 U.S. 305 (1988) 36-37

Howard University v. Best,
484 A.2d 958(1984) 31

Hudson v. Palmer,
468 U.S. 517 (1984) 39

Illinois Migrant Legal Council v. Pilliod,
540 F.2d 1062 (7th Cir. 1976) 33

International Distrib. Corp. v. American Dist. Telephone Co.,
569 F.2d 136 (D.C. Cir. 1977). 31

Jacobson v. U.S.,
503 U.S. 540 (1992) 19

Johnson v. Avery,
393 U.S. 483 (1969) 11, 13

Johnson v. Revenue Management,
169 F.3d 1057 (7th Cir. 1999) 41

Jones v. FBI,
41 F.3d 238, 246 (6th Cir. 1984) 46

Kyles v. Whitley,
514 U.S. 419 (1995) 13

Larson v. Domestic and Foreign Commerce Corp.,
337 U.S. 682 (1949) 26, 28-29

Lassiter v. Department of Social Services,
452 U.S. 18 (1981) 13

Lewis v. Casey,
518 U.S. 343 (1996) 11, 14, 17-18, 34

Lindsey v. Normet,
405 U.S. 56 (1972) 11

Little v. Streater,
452 U.S. 1 (1981) 7, 11, 12

Logan v. Zimmerman Brush Company ,
455 U.S. 422 (1982) 37, 39, 40

Loving v. Virginia,
388 U.S. 1 (1967) 25, 26

Lynum v. Illinois,
372 U.S. 528 (1963) 19

Marbury v. Madison,
1 Cranch 137 (1803) 48

Mayer v. Chicago
404 U.S. 189 (1971) 13

Meyer v. Nebraska,
262 U.S. 390(1923) 25, 26

Miller v. Pate,
386 U.S. 1(1967) 7, 13

Mitchell v. Forsyth,
472 U.S. 511(1985) 47, 48

M.L.B. v. S.L.J.
519 U.S.102 (1996) 11, 26

Napue v. People of the State of Illinois,
360 U.S. 264 (1959) 13

Orleans Parish School Board v. Earl Benjamin Bush,
242 F.2d 156 (5th Cir. 1957) 36

Palko v. Connecticut,
302 U.S. 319 (1937) 30

Parratt v. Taylor,
451 U.S. 527 (1981) 38, 39, 40

Planned Parenthood v. Casey,
505 U.S. 833 (1992) 26

Prince v. Massachusetts Prince v. Massachusetts,
321 U.S. 158 (1944) 26

Pullman-Standard v. Swint,
456 U.S. 273(1982) 40

Rochin v. California,
342 U.S. 165 (1952) 30

Rondeau v. Mosinee Paper Corp.,
422 U.S. 49 (1975) 36

Ryland v. Shapiro,
708 F.2d 967(5th Cir. 1983) 14, 34, 49

Scheuer v. Rhodes,
416 U.S.232 (1974) 15

Schnapper v. Foley,
667 F.2d 102 (1981) 31

Shalala v. Illinois Council on Long Term Care,
529 U.S. 1 (2000) 34

Smith v. Brown & Williamson Tobacco Corp.,
108 F.Supp. 2d 12 (D.D.C.2000) 18

Schweiker v. Chilicky
487 U.S. 412 (1983) 45

Swekel v. City of River Rouge,
119 F3.d 1259 (6th Cir. 1997) .. 14, 34, 35, 37, 38

United States v. Fallen,
498 F.2d 172 (8th Cir. 1974) 19

United States v. James Daniel Good Real Property,
510 U.S. 43 (1993) 39

United States v. Lanier,
520 U.S. 259 (1997) 48

United States v. Reynolds,
345 U.S. 1 (1953) 41

United States v. Russell,
411 U.S. 423 (1973) 19

Vasquez v. Hernandez,
60 F. 3d 325 (7th Cir. 1995) 14, 35

Washington v. Texas,
388 U.S. 14 (1967) 13

Wiggins v. Hitchins,
853 F.Supp.505 (1994) 27

Wilson v. Layne,
526 U.S. 603 (1999) 48

Zablocki v. Redhail,
434 U.S. 374 (1978) 25, 26

STATUTES AND REGULATIONS

5 U.S.C.
§702 30

28 U.S.C.
§1442 29
§2674 28
§2679(b)(2) 44

6 U.S.T. 3316,
T.I.A.S. No. 3364 43

OTHER AUTHORITIES

Art. 7, 1966 S. Treaty Doc. No. 95-2,
999 U.N.T. 171 43

Geneva Conventions,
Common Article 3 30

H.R. Rep. No. 367,
102d Cong, 1st session pt. 1 (1991) 42

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http://hrdata.aaas.org/ceh/report/
english/toc.html , ¶¶ 83, 108-122 31

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Technology, United States House of
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§65.06(2) 36

Restatement (Second) of Torts,
§ 323 18
§ 324 18

S. Rep. No. 249,
102d Cong., 1st session, (1991) 42

Torture Victim Protection Act of 1991,
Pub.L.No. 102-256, 106 State. 73
(1992) (codified at 28 U.S.C.
1350) 44

No. 01-394

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2001

WARREN CHRISTOPHER, ET AL.,
Petitioners

vs.

JENNIFER K. HARBURY
Respondent.,

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE D.C. CIRCUIT

BRIEF FOR RESPONDENT
JENNIFER K. HARBURY

INTRODUCTION

This case raises the remarkable question of whether the constitutional right of access to the courts is violated when U.S. government officials intentionally prevent, through the use of affirmative deception, a citizen from proceeding to the courts for emergency injunctive relief, when they know that her spouse is

suffering torture and is at risk of imminent extrajudicial execution, and that U.S. officials are implicated in that situation.

STATEMENT OF THE CASE

Respondent Jennifer Harbury is a United States citizen, and the widow of Efrain Bamaca Velasquez. Second Amended Complaint, ¶¶ 9, 33, Joint Appendix (J.A.) 23,26. Mr. Bamaca, a long-time opponent of the repressive regime in Guatemala and a commander of the Guatemalan resistance forces, disappeared on March 12, 1992. Id., ¶¶ 33, 34, J.A.26-27. The Guatemalan army reported that he died in combat. Id., ¶ 34, J.A.26-27.

In early 1993, Ms. Harbury learned that from an escaped prisoner that her husband was in fact captured alive, and was being secretly detained and tortured by Guatemalan military officers. Id., ¶¶ 50-54, J.A. 29. She did not know where he was being held.

Upon learning that her husband was alive and suffering torture, Ms. Harbury immediately contacted the State Department. She met repeatedly with State Department officials, including various Petitioners, asking for assistance in locating her husband and obtaining his humanitarian treatment. Throughout these meetings, Petitioners told her that they possessed no information about her husband, but that they would attempt to determine his fate and assist her. Id., ¶¶ 55, 59,67, J.A.30,31 . In fact, these statements were false:

Petitioners had been informed by the CIA long since that her husband had been captured alive and was being secretly detained and tortured. Id., 35, 56-57, J.A. 27, 30. Petitioners, furthermore, knew that agents of the U.S. government were involved in Mr. Bamaca's detention and torture. Id., ¶¶ 37, 44, J.A 27, 28. During their discussions with Ms. Harbury, they also knew that he was still alive. Petitioners intentionally deceived Ms. Harbury in order to prevent her from seeking legal remedies against the government. ¶¶ Id., 67-69,92, J.A. 31-32,36.

Throughout 1993 and 1994, Ms. Harbury made numerous efforts to locate and rescue her husband. She was permitted to open the grave in which the Guatemalan military claimed to have buried him, and found the body of quite a different man. Id., ¶ 60, J.A. 30. She continued to meet with State Department officials, who repeatedly deceived her, stating that they had searched for information about her husband but that they had no information about what had happened to him. Id., ¶¶ 55, 59, 61-63, 67-68, 70-77, J.A. 29-33. Petitioners also stated publicly and in letters to members of Congress that they had no information about Mr. Bamaca. Id., ¶¶ 59, 73-74 J.A,. 32-33.[1]

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[1] See, for example, Letter to Sen. Brown, Nov. 1993, stating in relevant part " We have no independent evidence about the fate of Mr. Bamaca" May 11, 1998 Hearing, "Access to Government Information and HR 2635", Subcommittee On Government Management, Information and Technology, United States House of Representatives, 105th Congress, Second Session, (Serial No. 105-

Relying on the State Department claims that they had no information, Ms. Harbury attempted to obtain information from the Guatemalan military itself. She twice engaged in hunger strikes in Guatemala in an effort to determine the whereabouts of her husband. Id., ¶¶ 64, 78-80, J.A. 31, 33-34. After a 32-day hunger strike in 1994, the television show "60 Minutes" aired a broadcast revealing that the U.S. embassy in Guatemala did, in fact, possess information indicating that her husband had been captured alive. Id. ¶ 81, J.A. 34. The State Department Petitioners then acknowledged for the first time that they indeed had confirmation from U.S. intelligence files of his initial capture and secret detention by the Guatemalan military. They still insisted that they had no further information regarding his current situation. Id., ¶ 82, J.A. 34. Ms. Harbury also met with the National Security defendants, who told her that they had "scraped the bottom of the barrel" for information, but had nothing further. Id., ¶ 83, J.A. 34.

Now aware that the Petitioners were deceiving her about the existence of information about her husband, Ms. Harbury filed Freedom of Information Act (FOIA) administrative request with all relevant agencies. Id.,¶ 85, J.A. 34-35. Receiving no response despite the exigent circumstances, she resumed her hunger strike. Id.,¶¶ 85, 87-90, J.A. 34, 35-56. On the twelfth day, United States Senator Robert Torricelli informed her that her husband had been killed by a

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175), at pp. 66-67. See Appendix, item B.

paid CIA informant. Id.,¶ 91, J.A. 36. Information later declassified and released in response to Ms. Harbury's FOIA lawsuit and in a report by the President's Intelligence Oversight Board, confirmed that Mr. Bamaca had been captured alive, tortured and extrajudicially executed, and that CIA operatives were responsible. Id.¶¶36-49, 91, J.A. 27-29, 36.

In addition, the publicly released information indicated that throughout 1993, as Respondent was seeking information about her husband and being told repeatedly that none existed, Petitioners were aware that he was still alive, suffering torture, and in danger of extrajudicial execution. Id.,35, 56-58, J.A.27, 30.

PROCEEDINGS BELOW

1. Ms. Harbury filed this lawsuit in 1996 against Petitioners and CIA officials, raising various claims. First, Ms. Harbury asserted three constitutional claims, alleging that the CIA defendants violated her husband's Fifth Amendment due process rights; her own right of familial association; and her right of access to the courts. In addition, she asserted various torts. Second Amended Complaint, J.A. 19-64.

2. In March 1999, the District Court dismissed all of Ms. Harbury's constitutional claims, Pet. App. 30a, entering final judgment on this decision in August of that year. Pet. App. 60a. The Court held that as a foreign national residing in a foreign country, Mr. Bamaca was not entitled to Fifth Amendment

substantive due process protections, and that even if he were, such right was not clearly established. Pet. App. 36a-43a. With respect to Ms. Harbury's access to courts claim, the Court dismissed because she had not sought a state court remedy first, and because defendants would anyway be entitled to qualified immunity. Pet. App. 43a-49a. Ms. Harbury's claim based on her right of familial association was also denied. Pet. App. 52a. Ms. Harbury's tort claims remain pending.

3. On appeal, the D.C. Circuit upheld the District Court's dismissal of Mr. Bamaca's substantive due process claim and Ms. Harbury's familial association claim. Pet. App. 1a. The D.C. Circuit however, overturned the decision on the access to courts claim, noting the uniform consensus in the circuit courts on this issue. Pet. App. 21a-22a

The Court then concluded that Ms. Harbury had plead a violation of the constitutional right of access to the courts and rejected the argument that she must first have attempted to bring a state court claim. The Court reasoned that such a prerequisite is unnecessary in the limited number of cases where such a proceeding would be "futile." Pet. App. 26a. As for Petitioners' qualified immunity, the Court held that it was "obvious" that such conduct was unconstitutional. Id. at 28a. The Defendants below filed timely motions for Rehearing and for Rehearing En Banc, which were denied.

SUMMARY OF THE ARGUMENT

1. The due process right to access to the courts has been deemed fundamental since *Chambers v. Baltimore& Ohio R.R.*, 207 U.S. 142 (1907). This right includes not only the right to access itself, *Ex Parte Hull*, 312 U.S. 546 (1941) but also the right to obtain and fully present evidence and legal arguments in a fair hearing. *Bounds v. Smith*, 430 U.S. 817 (1977) and *Little v. Streater*, 452 U.S. 1 (1981). By corollary, such presentation may not be thwarted by the concealment or falsification of key evidence. *Brady v. Maryland*, 373 U.S. 83 (1963), *Miller v. Pate*, 386 U.S.1 (1967). When officials intentionally engage in a cover up to prevent an aggrieved person from filing suit against the government, the right to access to courts is violated. *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984).

2. Respondent, Ms. Harbury, has stated a claim for violation of her right to access to the courts. She alleges that her husband, Efrain Bamaca Velasquez was captured alive by the Guatemalan army in March, 1992, and was subjected to long term and severe torture by military intelligence officials serving as CIA paid informants, or "assets". In order to prevent international outcry, these officers falsely reported that Mr. Bamaca had died in combat. Fully aware of this situation, CIA officials continued to seek and pay for information being simultaneously extracted from him by their assets through the use of torture. Ms. Harbury learned in early 1993 that her husband was still alive and in secret detention, though she knew not where.

Nor did she know of the CIA involvement. She promptly sought the assistance of various State Department officials, who stated that they had no information, but promised to investigate and assist her. Petitioners continued to insist to Ms. Harbury and inquiring Congressional Members, that they possessed no information until late 1994. In fact, as alleged by Ms. Harbury, the Petitioners had from the beginning been fully notified by the CIA of Mr. Bamaca's situation, and the U.S. involvement therein, and received numerous bulletins throughout their two year course of dealings with Ms. Harbury. The needed information was in fact deemed proper for declassification by the government itself. Had such information been timely provided, she could have proceeded to the courts for emergency injunctive relief to save her husband's life. Instead the Petitioners chose to affirmatively deceive Ms. Harbury so as to obstruct her search and prevent her from filing suit against the government. By the time the truth was revealed, her husband had been murdered.

3. Ms. Harbury does not assert that the Petitioners had a legal duty to affirmatively seek her out and inform her of her husband's situation. However, they were prohibited by the constitution from affirmatively deceiving her in order to prevent her from seeking court redress. Such conduct was in and of itself tortious, especially once the Petitioners promised her they would assist and investigate .

4. Ms. Harbury does not argue that all information concerning her husband, including state secrets, should

have been released to her. Rather, she argues that the government eventually reviewed and declassified many government files. Such declassified information, by definition, did not constitute state secrets. These very files, if timely revealed, would have provided her with all the facts needed to state a claim in federal court while her husband was still alive.

5. There were numerous causes of action for emergency injunctive relief which Ms. Harbury could have presented in federal court, had the crucial information not been concealed. Suit for injunctive relief would have been brought against high level CIA and other federal officials in Washington D.C. issuing decisions and orders regarding Mr. Bamaca's treatment, requesting further information from him, allocating federal funds to pay for such information, despite the ongoing use of torture, and engaging in the cover up. On her own behalf Ms. Harbury could have claimed violations of her constitutional rights to the pursuit of happiness, as well as to protect and preserve her family, and the intentional infliction of emotional distress. On behalf of her husband, she could have sued for failure to supervise, and for civil conspiracy, regarding assault and battery.

6. Ms. Harbury's claims do not improperly infringe upon matters of foreign affairs. To the contrary, a ruling will simply deter public officials from improperly barring the doors to the courthouse. There is no need to evaluate our national foreign policy or require any changes thereof. Moreover, such a ruling would be fully

harmonious with our long standing national policy of respect for human rights and the prohibition of torture.

7. A Bivens remedy is fully appropriate in this case. Ms. Harbury's fundamental right to access to the courts has been violated, and no award of damages can remedy the loss of her day in court in this context. No comprehensive statutory scheme addresses the rights and harms presented here. Deterrence is appropriate to protect the citizenry's fundamental right to access to the courts.

8. Qualified immunity is not appropriate, as the standards of the due process right to access to the courts have long been clearly and fully articulated.

ARGUMENT

I. ACCESS TO COURTS

The due process right to access of the courts has long been held sacrosanct. As stated by this Court in *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148. (1907):

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship.

This Court has been both swift and vigilant in preserving this fundamental right. Protection has been granted in a number of different contexts. See : *Ex Parte Hull*, 312 U.S. 546 (1941)(prison regulation prohibiting prisoners from filing a petition for habeas corpus unless found "properly drawn" by a state official); *Johnson v. Avery* 393 U.S. 483 (1969)(prison regulation prohibiting inmates from offering legal assistance to one another); *Boddie v. Connecticut*, 401 U.S. 371 (1970) (state fee requirement for filing for the divorce); *Little v. Streater*, 452 U.S. 1 (1981)(provision of blood testing in indigent father's paternity suit). *Gideon v. Wainwright*, 372 U.S. 335 (1963) (counsel for the criminally accused); *Boddie v. Connecticut*, 401 U.S. 371, (1970) (provision of transcripts for accused on appeal); *Lindsey v. Normet*, 405 U.S. 56 (1972) (double bond requirement for appeals of evictions); *Bounds v. Smith, 430 U.S. 817 (1977)* (reasonable access to law libraries for inmates); *M.L.B. v. S.L.J.* 519 U.S. 102 (1996) (provision of transcript for appeal of termination of parental rights). In recent years this Court has taken care to curb overly intrusive remedial orders from the lower courts, to give proper deference to state expertise or the state right to assess regulatory fees. *Lewis v. Casey*, 518 U.S. 343 (1996). However, the transcendent importance of the right to access itself remains fully recognized and vigorously preserved.

The Petitioners in this case urge that the access to courts doctrine is limited to cases involving an institutional bar to filing suit or the special needs of prison inmates. Although these two factual scenarios

are, indeed, frequently presented, this Court has never imposed such narrow parameters on so fundamental a right. Deeply rooted in the Due Process Clause, this doctrine carefully mirrors the basic requirement that the government provide an opportunity to be heard, and that hearing provided be a fair one.

As the cases make clear, the due process right of access to the courts is multi-faceted and must be flexibly applied. Certainly any structural mechanisms barring actual access will be struck down, as they literally place a fair court hearing beyond the reach of an aggrieved person. Thus, as in *Ex Parte Hull*, supra, a state official may not weed out inmate petitions failing to meet with his personal approval. Nor may a state impose such burdensome fees that the right to actual access for many seeking to redress crucial interests, becomes void. *Boddie v. Connecticut*, supra.

The Court has, however, also been vigilant in preserving and protecting the quality of the court hearing itself, and has not permitted the right of access to become an empty formality. Rather, access must be "adequate , effective and meaningful." This second prong of the right has required that the party not only be able to appear in court, but must also be permitted to develop and make the most full and reasoned presentation of evidence, witness testimony, and legal arguments within his ability. Under special circumstances, affirmative assistance has even been required. Thus in *Little v. Streater*, 452 U.S. 1 (1981), the Court required that blood testing be provided to an

indigent putative father in a state ordered paternity suit. In *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), it was held that a parental rights termination hearing might sometimes require the provision of legal counsel. Moreover, a transcript adequate to permit reasonable identification and review of errors of law or fact is important in preserving such fairness. *Mayer v. Chicago* 404 U.S. 189 (1971). For the same reasons, the state must permit prison inmates reasonable access to law books or legal advisors in order to develop their presentations, *Johnson v. Avery*, supra and *Bounds v. Smith*, supra.

By corollary, state officials may not take affirmative steps to wrongfully conceal, destroy or falsify crucial evidence. It is basic jurisprudence that when such misconduct thwarts the right to a fair, and effective hearing, the due process clause has been violated. *Brady v. Maryland*, 373 U.S. 83 (1963), *Napue v. People of the State of Illinois*, 360 U.S. 264 (1959), *Miller v. Pate*, 386 U.S. 1 (1967), *Giglio v. United States*, 405 U.S. 150 (1967), *Washington v. Texas*, 388 U.S. 14 (1967), and *Kyles v. Whitley*, 514 U.S. 419 (1995). In short, in the context of the due process requirement of a fair, and meaningful hearing, the right to access to courts and the right to a fair hearing are precisely co-extensive, the two phrases representing but two descriptions of the same principle.

In close keeping with these clear mandates, the federal courts of appeals have repeatedly held that when officials engage in an affirmative and wrongful

cover up of key information, with the intention of preventing a lawsuit from being filed against the government, and harm occurs, then the due process right to access to the courts has been violated. Even when litigation is filed, but a fair, meaningful and effective hearing of the claim is crippled by such cover-up, due process has been violated. *Bell v. City of Milwaukee*, 746 F2d. 1205 (7th Cir 1984); *Ryland v. Shapiro*, 708 F.2d 967,973-75 (5th Cir. 1983); *Barrett v. United States*, 798 F.2d 565,575 (2d Cir. 1986). See also, *Vasquez v. Hernandez*, 60 F. 3d 325, 328 (7th Cir. 1995), *Swekel v. City of River Rouge*, 119 F3.d 1259,1262 (6th Cir. 1997); *Delew v. Wagner*, 143 F.3d 1219, 1222 (9th Cir. 1998).

The ruling in *Lewis v. Casey*, 518 U.S. 343 (1996) does not alter the legal requirements and prohibitions discussed above, but rather simply limits their inappropriate expansion in the prison context. In *Lewis*, the Court struck down an overbroad injunction requiring sweeping reforms of a prison legal system, especially given the failure to establish actual harms. Specifically, the Court held that the State was not required to take affirmative action to enable prisoners to discover grievances, and litigate effectively, or in short, to become "litigating engines" in all fields of law, id, 354-355. However, the Court also recognized that a valid grievance would indeed be presented if the legal library or legal assistance program was so inadequate as to actually hinder efforts to pursue a claim, or even file a complaint. This ruling is inapposite to the above cited cases, all of which deal with affirmative and wrongful

actions taken by officials with the intent to prevent the filing of suit, and with resulting actual harm.

It is clear from the above that the decision of the appellate court in this case was fully justified by substantial legal precedent, as well as the mandates of the Due Process clause itself. In the context of a motion to dismiss for failure to state a cause of action, the reviewing court must take all of the plaintiff's assertions as true, and those allegations should be construed favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S.232, 236 (1974). A complaint should not be dismissed "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41,45-46 (1957).

Ms. Harbury has pleaded that the government Petitioners intentionally deceived her in order to block her access to critical information about her husband's situation, and thus vitiate her ability to file suit against the government. This wrongful and affirmative obstruction was so complete as to not only deprive Ms. Harbury of a meaningful hearing; it deprived her of even the facts necessary to state a cause of action. Until March 1995 she had no awareness of any U.S. involvement in her husband's plight. Such official misconduct falls squarely within the principles enunciated above.

Ms. Harbury specifically asserts that during much of the period of deception, her husband was alive,

suffering torture, and in danger of extra-judicial execution by CIA operatives, and that Petitioners were fully aware of these exigent circumstances. Moreover, they possessed numerous records that the government itself deemed appropriate for declassification, and which would have provided her with all necessary facts. Had she timely received those records, she would have immediately proceeded to the courts to seek emergency injunctive relief. Instead the Petitioners chose to obstruct and thwart her investigation by affirmative acts of deception; indicating again and again that they had no information but would attempt to assist her. But for this deception, she could have obtained the documents through administrative requests under the Freedom of Information Act, or effectively sought the assistance of Congress. Since both Ms. Harbury and concerned Congressional Members were repeatedly informed that was no information to seek, legal demands for "non-existent" information were not pursued by either. Instead, Ms. Harbury risked her life attempting to gain information directly from the Guatemalan military itself. In short, crucial information necessary to a fair, effective and meaningful hearing was placed beyond her reach through wrongful and affirmative state conduct. Given her husband's death, relief is no longer available.

The misconduct of the Petitioners, if condoned, would have frightening repercussions with regards to both the safety and trust of the American public. United States Customs officials, for example, might well seek to work with a known "coyote" group (persons bringing

undocumented aliens to the United States, usually in return for exorbitant fees) in order to obtain important information about narcotics smuggling. However, if that group were to engage in the kidnaping of young women for use in a prostitution network, could Customs officials lie to the U.S. parents and state that they possessed no information about their daughters? If Customs officials had full knowledge of the situation, could they continue to make payments to the ringleader in return for the flow of information? Could they do so knowing that he was personally abusing the daughter?

Similarly, could Department of Energy officials, knowing that a contractor was causing toxic wastes to leak into a local neighborhood, causing an epidemic of diseases amongst the children, affirmatively deceive inquiring parents about the causes, when such information was critical to the medical cure? Could payments to the contractor continue without requiring improved safety procedures? Clearly the answer must be no, without extraordinary circumstances meeting the strict scrutiny standard of review.

A. Ms. Harbury's Claims Are Based upon Affirmative Efforts to Deceive, Not the Failure to Affirmatively Inform; and Ms. Harbury Had the Right to Rely upon the Truthfulness of Government Statements.

This case is rooted in government acts of deception and cover up. The Petitioners seek to skew the nature of claim presented, by citing *Lewis v. Casey,*

518 U.S. 343 (1996) for the proposition that the government bears no responsibility for affirmatively assisting a person to discover grievances. However, Ms. Harbury has never asserted that the officials in question should have taken affirmative steps to locate and inform her of her husband's situation when they first learned of it in March 1992.

To the contrary, Ms. Harbury claims that once she sought information and help from these U.S. officials, they agreed to help her, then affirmatively and impermissibly deceived her again and again. The intended goal was to assure that she could not discover the truth and bring suit against the government This difference was noted by the Court of Appeals.

Although the officials in question may not have had a duty to affirmatively inform Ms. Harbury of her husband's situation, they were barred from taking affirmative steps to intentionally deceive her. Not only did such actions violate Ms. Harbury's due process rights, they constituted tortious action in and of themselves. *Smith v. Brown & Williamson Tobacco Corp.*, 108 F.Supp. 2d 12, 15 (D.D.C.2000). Moreover, where Petitioners promised repeatedly to investigate, assist and report back, then intentionally placed her in harm's way, the wrongful nature of their conduct is exacerbated. Restatement (Second) of Torts, § 323 and 324.

The Petitioners' arguments regarding the government need to occasionally use stealth and

deception are inapplicable here. Those cases are rooted in the law enforcement context and simply note the right of a police force to use appropriate investigation techniques. *Jacobson v. U.S.*, 503 U.S. 540 (1992);*United States v. Russell*, 411 U.S. 423 (1973). Persons involved in criminal activities may be subjected to acts which would be prohibited with regards to any civilian, such as a stop, search, and even an assault. The very nature of law enforcement investigations makes inevitable the occasional application to the innocent as well as the guilty. However, even in these cases there are clear limits on the use of deception. *Lynum v. Illinois*, 372 U.S. 528 (1963). None is relevant here. Ms. Harbury was not suspected of perpetrating a crime; rather, she was attempting to prevent one.

Ms. Harbury, moreover, had every right to presume and rely on the truthfulness of official government statements to her. See *United States v. Fallen* 498 F.2d 172 (8th Cir. 1974). For precisely this reason, the courts have long permitted equitable tolling in cases involving government cover-ups. The aggrieved party will not be penalized for reasonable reliance on the truthfulness of officials. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1228 (7th Cir. 1984); *Barrett v. United States*, 689 F.2d 324,328 (2nd Cir. 1982); *Hohri v. United States*, 782 F.2d 227 (D.C. Cir. 1986)

It was not until November 1994, nearly thirty days into her hunger strike in Guatemala City that Ms. Harbury learned from a "60 Minutes" broadcast that the Petitioners were deceiving her, and that critical

information did in fact exist in U.S. files. She then, indeed, took appropriate independent action to obtain that information.

Should citizens not have the right to trust in the honesty of government officials, the results would wreak havoc. Could government health officials falsify records in experimentation cases, then defend on the grounds that the relatives should have simply guessed, in the absence of any evidence, that falsification had occurred and filed a FOIA suit? Surely not. Any other answer could only create distrust of the government, invite official corruption and promote injustice. Moreover, it would obligate the citizenry to file needless litigation to preserve their rights.

Ms. Harbury, furthermore, has never claimed that the government officials should have given her *all* of the information they possessed about her husband, including matters of state secrets. Indeed, such information even today remains classified and beyond her reach. Of this she does not complain. Rather, she asserts that a great deal of information was in fact appropriate for declassification and release. This is shown by the fact that in late 1995 the government itself did review the files and then declassify and release numerous records through the Freedom of Information Act. Still more files were voluntarily declassified by the Intelligence Oversight Board in 1996. The information deemed proper for release would have been fully adequate to enable her to file suit for her husband's life, revealing as it did the key facts of his capture, torture,

risk of extra-judicial execution, and the involvement of a number of CIA operatives. Sadly, it took a three year campaign by Ms. Harbury, Congressional wrath, a sweeping White House investigation, a futile effort by Ms. Harbury in January 1995 to obtain the records through the FOIA, and the filing of federal litigation, before information began to trickle in to her hands. Had this very information been timely disclosed, instead of affirmatively concealed, Ms. Harbury could have acted to save her husband's life.

In light of the above, the government Petitioners had several acceptable choices available to them. Even without a FOIA request, they had the authority to arrange for declassification, and release of the documents, as stated by their own legal department.[2] In addition, they had a number of proper alternatives. They could have remained silent altogether, or informed Ms. Harbury that they were unable to assist her or to comment on the matter. Further, they could have given a Glomar response, refusing to either confirm or deny the existence of any information. Any of those appropriate responses would have alerted Ms.

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[2] Declassified State Department document, dated March 1995, discussing how to answer press questions in light of the divulgations. " We should not use the "legally proscribed from releasing classified intelligence to private individuals..." language I suggested yesterday. Sorry if I steered you wrong on this. After our exchange of e mails I consulted INR's person in L. His comments are attached and make sense. Their view, in short, is that we (the exec. Branch) could have made a decision to declassify the --intell and share it with Harbury. Sorry." Appendix, Item C.

Harbury that information might or might not exist, and she would have swiftly moved to ascertain the matter by resort to the FOIA or Congressional assistance.

Indeed, the Glomar denial was developed for precisely this situation, as it protects all sensitive information without permitting the government to engage in deceit. Although the Petitioners urge that a repeated use of the glomar denial might lead to a flood of FOIA cases, the reverse is, in fact, true. Should citizens know that their officials have the right to lie, then the public distrust would lead to a flood of wasteful and defensive litigation.

The proposition that government officials may affirmatively deceive a citizen, in order to thwart a fundamental right such as access to the courts, is untenable. The hypothetical situations suggested by Petitioners have no bearing on this issue, as none involve deceptions intended to prevent the filing of suit.

B. In 1993 Ms. Harbury Could Have Filed Suit in Federal District Court for Emergency and Declaratory Relief. These 1993 Causes of Action Are Concrete and Not Conjectural.

The government Petitioners in this case assert that Ms. Harbury could not have brought any legal actions in 1993 through 1994 to save her husband's life, or, in the alternative, that such claims are vague and conjectural. Such assertions are incorrect.

In 1993, while Mr. Bamaca was known to be still alive[3], Ms. Harbury could have brought suit for declaratory and injunctive relief in federal district court, stating various causes of action. The facts alleged would have been similar to those presented in the case at bar. She would have claimed that CIA officials were authorizing, requesting, causing, aiding, participating and conspiring in the ongoing torture of her husband at the hands of their paid agents, or "assets" in Guatemala. Specifically, such CIA agents were knowingly causing her husband's torture by seeking and paying for information which they knew was *contemporaneously* being extracted from him by those "assets", through the use of torture, in order to obtain such payments. Such actions were placing him in danger of imminent extra-judicial execution. Cover up efforts were blocking his rescue.

Contrary to the Petitioners' assertions, the legal claims would not have been brought against the Guatemalan government or any Guatemalan agent. Rather, suit would have been brought against high level CIA officials in Washington D.C. who were rendering decisions and orders as to the treatment of Mr. Bamaca, the cover-up of his situation, the payment for information being extracted from him through torture; and allocating and transmitting federal funds for such actions. The suit would have included implicated CIA

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[3] New evidence exists suggesting that Mr. Bamaca in fact survived well into 1994 if not longer.

officers in Guatemala, and other officials implicated in an ongoing cover-up.

The harms alleged in such litigation would have been Ms. Harbury's emotional distress, loss of consortium, and the pending destruction of her family. The harms to Mr. Bamaca would also have been presented by Ms. Harbury as his guardian or next of kin, and would have included his acute physical harm and imminent loss of life.

The precise causes of action set forth in Ms. Harbury's 1993 complaint would have included the following :

1. Violation of Ms. Harbury's Fifth Amendment Rights:

In 1993, Ms. Harbury could have properly presented a claim for injunctive relief under the Fifth Amendment for deprivation of her liberty interests. Not only were the CIA defendants promoting her husband's torture and endangering his life, but as a result of the improper concealment, neither she nor Congress were able to insist on his humanitarian treatment or his right to a fair trial. Instead, Ms. Harbury was left to risk her own life in a long and futile campaign in Guatemala. These actions inflicted grave emotional distress upon Ms. Harbury. Indeed, the official conduct towards her can only shock the conscience.

The orderly pursuit of happiness has long been recognized as a basic component of the right to liberty protected by the Due Process Clause of the Fifth Amendment. As stated in *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923);

> "[T]he liberty thus guaranteed...denotes [illegible] merely freedom from bodily restraint, but also the right of the individual to contract , to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." (citing Slaughter House cases, 16 Wall.36).

See also, *Zablocki v. Redhail,* 434 U.S. 374 (1978) and *Loving v. Virginia,* 388 U.S. 1 (1967) (matters involving marital relationships were among such essential personal rights).

Clearly, the conduct of the CIA and other officials in 1993 constituted a wrongful emotional battery in violation of Ms. Harbury's protected liberty interests in the orderly pursuit of happiness. Accordingly, she would have had the right to proceed to the courts for injunctive relief. There would have been no sovereign immunity bar as constitutional

violations have long been ruled to be actions which, by definition, do not represent the government. See *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949).

2. Violation of Ms. Harbury's Constitutional Family Rights :

Ms. Harbury had a fundamental right to marry, to remain married, and to preserve her family. Indeed, marriage has long been accorded the highest of constitutional protections, and efforts to infringe upon such rights have been sharply curbed. *Loving v. Virginia* 388 U.S. 1 (1967) (" Marriage is one of the 'basic civil rights of man', fundamental to our very existence and survival." Id. at 12-13). See also *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Boddie v. Connecticut*, 401 U.S. 371 (1971). This penumbra of privacy has been extended as well to all aspects of family affairs. *Meyer v. Nebraska*, 262 U.S. 390 (1923). *Planned Parenthood v. Casey*, 505 U.S. 833 (1992);*Griswold v. Connecticut*, 381 U.S. 479 (1965); *Prince v. Massachusetts*, 321 U.S. 158 (1944); and *M.L.B. v. S.L.J.*, 519 U.S. 102 (1966).

In light of the above, Ms. Harbury had the right to marry Mr. Bamaca, bear his children, raise a family as the two of them saw fit, and even terminate their relationship through divorce if they so wished. Given this broad penumbra of protection and privacy, Ms. Harbury clearly had the right to protect and preserve her family. In 1993 she could have filed suit, claiming that the CIA defendants were unlawfully blocking her

rescue efforts despite awareness of her marriage and her efforts to save her husband.[4] Again, she would have had the right to seek injunctive relief for violation of her Due Process rights. Sovereign immunity would have presented no bar.

3. Conspiracy to Commit Assault and Battery:

In 1993, Ms. Harbury could also have stated a claim for civil conspiracy to commit assault and battery. To establish a conspiracy, the plaintiff must show that there was an agreement to participate in unlawful actions, or lawful actions via unlawful means, and that there was an overt act taken, resulting in a harm or injury. *Wiggins v. Hitchins* , 853 F.Supp. 505 (1994) Aiding and abetting is established where a person knowingly assists a tortfeasor, and is aware of his role in the illegal activity at the time. *Halberstam*, 705 F.2d 472,479 (D.C. Cir. 1980).

In light of the factual allegations set forth above, Ms. Harbury could have stated claims for both civil conspiracy to commit, and aiding and abetting, unlawful actions. For conspiracy, she would have alleged that the CIA had entered into an agreement with their assets that Mr. Bamaca should be tortured for

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[4] This claim was dismissed by the Appellate Court in the context of a Bivens claim for damages, in light of the potential floodgate of suits from various relations in a wrongful death case. However, no such concerns would arise where the violations were ongoing, and injunctive and declaratory relief were sought.

his information, and that they would, in return, pay for such information. Payment was made, constituting the overt act. Both Mr. Bamaca and Ms. Harbury were harmed as a result. All U.S. officials involved in a continuing cover- up would also have entered into the agreement, committed an overt act (i.e. the cover up itself), with the resultant harms described. Similarly, such actions aided and abetted the assault and battery.

A federal court would have had jurisdiction to hear Ms. Harbury's claim for injunctive relief under the doctrine of pendant jurisdiction[5]. State law may not expand or limit the scope of authority of a federal officer, *Bivens v. Six Unknown Agents of the Federal Narcotics Bureau*, 403 U.S. 388, 395 (1971), but such officer may nevertheless be subjected to non-conflicting state law claims. This reality is reflected in the provisions of the removal statutes, such as 28 U.S.C. 1442. *Arizona v. Maypenny*, 451 U.S. 232, 241-243 (1981). Indeed, common law tort claims against federal officials are routinely handled under the Federal Tort Claims Act, 28 U.S.C. §§ 2674. Here, a federal court would have been determining the key federal issues. The relevant question is thus whether sovereign immunity or pre-emption issues arose.

Sovereign immunity can never be applicable in the context of torture, and officials engaging in such actions do not represent the sovereign. In *Larson v.*

[5] The federal court would also have had diversity jurisdiction.

Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949) two exceptions to sovereign immunity were clearly set forth.

> [W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* ... and therefore may be made the subject of specific relief.

Id., at 689.

The CIA officials in question here were clearly acting outside the scope of their statutory authority. While they certainly have the authority to collect, correlate and evaluate intelligence relating to national security, that authority is not without limits. Torture is far beyond such limits. Injunctive relief was thus appropriate.

While the purchase of crucial intelligence from "unsavory" persons might sometimes be appropriate and necessary, there is no justification for requesting and paying for information being simultaneously extracted from a human being through the use of torture. Such conduct crosses the line between bona fide intelligence gathering and participation in torture. Although the United States government, under limited

circumstances, is permitted to take life, it has never been permitted to engage in the torture. *Rochin v. California*, 342 U.S. 165, 169 (1952)(government may not "offend those canons of decency and fairness which express the notions of justice of English speaking peoples even towards those charged with the most heinous offence." Federal officials may not engage in conduct which shocks the conscience. *Palko v. Connecticut*, 302 U.S. 319 (1937). It was the dream of the Founding Fathers to leave behind them the horrors of the Inquisition or the Star Chamber. *Culumbe v. Connecticut*, 367 U.S. 568, 581-586 (1961).[6] Thus the statutory authority of the CIA may not be construed to permit the direct engagement of U.S. officials in acts of torture.

Quite apart from the ultra vires nature of the CIA conduct with respect to Mr. Bamaca, yet another ground for relief existed in 1993 with respect to this tort claim. If an agency rule or regulation allegedly authorizing the CIA conduct in this case was presented, Ms. Harbury would have had the right to challenge its validity and/or its application to her husband in particular, and the waiver of immunity under the Administrative Procedure Act, 5 U.S.C.§702 would have come into effect. As high level officials were making the decisions in question, and as immediate and irreparable harm was occurring, and no avenues of appeal were provided, Ms. Harbury could have sought

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[6] See also, Geneva Conventions, Common Article 3, prohibiting the torture of prisoners of war. Appendix, item A.

equitable relief. See generally, *DRG Funding Corp. v. Secretary of Housing and Urban Development*, 76 F.3d 1212 (D.C. Cir. 1996); *Cobell v. Norton*, 240 F.3d 1081, 1094-1095 (D.C.Cir. 2001); *Schnapper v. Foley*, 667 F.2d 102, 107-108 (1981). Under precisely this analysis, Ms. Harbury could have sought equitable relief for intentional infliction of emotional distress (see, *Howard University v. Best*, 484 A.2d 958 (1984) and the refusal to supervise (*International Distrib. Corp. v. American Dist. Telephone Co.*, 569 F.2d 136 (D.C. Cir. 1977).

Such relief would have harmonized with the foreign affairs policies of that time; to promote human rights in Guatemala. The Guatemalan army was reaching near pariah status due to its human rights violations, and Congress had cut off military aid.[7] Actions by rogue operators to assist in torture undermined these policies.

4. Relief Sought :

In 1993, Ms. Harbury would have sought the following equitable relief for the above described causes of action:

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[7] In 1999 the United Nations Truth Commission published its findings on Guatemala, concluding that the army counter-insurgency tactics constituted genocide, and that the state military forces were responsible for 93% of the human rights violations during the war. "Memory of Silence", April 27, 1999, http://hrdata.aaas.org/ceh/report/english/toc.html, ¶¶ 82, 108-122.

1. Declaratory Judgement that a.) the official acts of knowingly requesting and paying for information being contemporaneously extracted through the use of secret detention and torture , b.) the official acts of deception aimed at obstructing the full and efficient investigation of Mr. Bamaca's fate, in order to prevent his rescue, and c.) the official failure and refusal to properly instruct U.S. personnel in Guatemala to cease torturing Mr. Bamaca, and present him to the courts of law, were unlawful.

2. Injunctive relief requiring that all remaining information regarding Mr. Bamaca be immediately transferred to the United States Congress, so that its members might assist Ms. Harbury through appropriate diplomatic channels, and prohibiting a) the failure t o properly supervise assets engaged in Mr. Bamaca's torture, and b.) the use of federal funds to request and purchase of information being contemporaneously extracted from Mr. Bamaca through the use of torture.

5. Injunctive Relief Would Have Been Effective and Appropriate:

Given the power and control inherent in any employer employee relationship, coupled with the significant monetary benefits provided to the CIA's assets in return for information, as well the panoply of other privileges and protections afforded such assets as part of their working relationship with the U.S. government, it is highly probable that the judicial relief

set forth above would have been enough to compel Mr. Bamaca's release to the courts of law for a fair trial. This probability is heightened by the realities of the long term economic and political relationship between Guatemala and the United States.

Moreover, injunctive relief is the traditional and finely tailored judicial tool for curbing abuses of power, and would have been appropriate here. *Illinois Migrant Legal Council v. Pilliod*, 540 F.2d 1062 (7th Cir. 1976) (racial profiling); *Clark v. Library of Congress*, 750 F.2d 89 (D.C.Cir. 1984) (discriminatory employment practices.)

In light of the above, it is clear that Ms. Harbury had a number of claims in 1993 which would have passed the "reasonable basis" test set forth in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 742-743, (1983). See also, *Bell v. City of Milwaukee*, 746 F.2d 1205, 1263 (7th Cir. 1984)("Thus the siblings' lack of recovery . . . does not vitiate their Section 1985 claim. The Fourteenth Amendment confers the right to a fair opportunity to present a claim, and the siblings' 1983 claim has a 'reasonable basis in fact or law' ".) It is sufficient that Ms. Harbury articulate 1993 claims with a reasonable basis. Bell, id. at1263 n.72. The right here is the right to access, not the right to guaranteed redress.

C. Ms. Harbury Is Not Required to First Proceed to State Court :

The Petitioners in this case urge that Ms. Harbury is barred from asserting a claim for violation

of her right to access to the courts until she has first filed her 1993 claims, and attempted to litigate them. In support of their position, they cite *Swekel v. River Rouge*, 119 F.3d 1259 (6th Cir 1997) and *Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998). Neither ruling supports the Petitioners' claim. There is no exhaustion requirement where such efforts would be futile, or where there is no adequate remedy available. *Shalala v. Illinois Council on Long Term Care*, 529 U.S. 1 (2000). Clearly, requiring Ms. Harbury to assert her claims for injunctive relief, now that her husband is already dead, would be quite futile.

This "exhaustion" requirement is but a judicial finding that the claim presented was not yet ripe for review. Any plaintiff must show actual harm to his or her rights or interests. Indeed, this was the core objection to the sweeping injunctive provisions in *Lewis v. Casey*, supra. Where a government cover- up is promptly discovered, it may well be that the original cause of action, though delayed or temporarily diverted, may still be fully litigated. Where it is still possible to file or continue the litigation, the courts have often required the Plaintiff to do so, withholding a decision on the access to courts claim until the actual damage wreaked can be determined. As noted in *Swekel*, many of the harms resulting from a cover up may be remedied by a presiding judge, through equitable measures. Nevertheless, the courts have recognized that the delay itself may well have caused serious harm. *Ryland v. Shapiro*, 708 F2d 967, 974(1983).

For these reasons the courts have frequently withheld an immediate ruling on the access to courts claim presented, choosing instead to wait until the question of actual damages has ripened. As stated in *Delew v. Wagner* 143 F3d 1219 (9th Cir. 1998), a plaintiff cannot merely guess that a state court remedy has been rendered ineffective. See also, *Swekel v. City of River Rouge* 119 F.3d 1259 (6th Cir. 1997), *Vasquez v. Hernandez*, 60 F.3d 325 (7th Cir. 1995) Logically enough, the courts have never required that a plaintiff return to court where such an effort would be plainly futile, *Swekel City of River Rouge*, 119 F.3d 1259, 1264 n.2 , or where the damage to the claim or remedy is self evident. *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984).

In this case Ms. Harbury can file no claim for emergency injunctive relief in any court of law. Her husband, during the period of deception alleged, was murdered. No court can grant her now the relief she would have sought during the substantial time frame that the government officials knew he remained alive. To require a pro- forma resort to court on these claims would verge on the absurd.

D. The Potential for a Monetary Award after Mr. Bamaca's Murder Is Not an "Adequate Remedy" with Regards to Ms. Harbury's Claim for Denial of Access to the Courts.

The Petitioners claim that there is no denial of access to the courts, where, as here, there may still be

the possibility of a claim for monetary damages. In short, as Ms. Harbury might still be able to obtain damages for her lower court Federal Tort Claims Act claims, she may not be heard to complain that she was barred from preventing her husband's death. Long standing jurisprudence disagrees with this position.

In the first instance, the Petitioners are estopped from making such an argument, as they themselves continue to urge the dismissal of all remaining tort claims currently pending in the district court. In their brief, they identify not a single cause of action which they concede could still be brought for money damages.

More importantly, the Petitioners fail to recognize the fundamental difference between equitable relief and damages. By law, injunctive relief can only be granted where the plaintiff is suffering from immediate and irreparable harm. (Moore's Federal Practice, 3d Edition, §65.06(2)) . Irreparable harm, in turn, is defined as harm for which money can give no true relief. See, for example, *Beacon Theaters v. Westover*, 359 U.S. 500 (1959). Moreover, the purpose of injunctive relief is to deter, not to punish. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975).

Such irreparable harm has been found in a broad spectrum of factual settings over the years, including, *Orleans Parish School Board v. Earl Benjamin Bush*, 242 F.2d 156 (5th Cir. 1957) (school segregation.); *Dreyer v. Jalet* 349 F.Supp. 452 (S.D. Tex. 1972) (repeated assaults and harassment in prison); *Honig v. Doe* , 484 U.S. 305

(1988)(expulsion of disabled children). Equitable restraining orders, moreover, are routinely issued by the courts in the context of domestic violence. Clearly, ongoing torture and familial destruction would constitute irreparable harm.

Obviously, if money damages were an adequate substitute for equitable relief, then no injunctions could ever be granted. The concept that money cannot buy everything forms the very basis of equitable relief. The goal of Ms. Harbury's lost day in court was the preservation of her husband's life. Her current, limited, claims for damages offer no qualitative equivalent. The principle that monetary damages do not offer an adequate remedy is confirmed in *Logan v. Zimmerman Brush Company*, 455 U.S. 422 (1982), a case involving employment discrimination. A post deprivation hearing in that case was ruled inadequate : "That is particularly true where, as here, the State's only post-termination process will never make the complainant entirely whole: the Illinois Court of Claims Act does not provide for reinstatement...and even a successful suit will not vindicate entirely Logan's right to be free from discriminatory treatment." Id. at 436-437.

Petitioners mistakenly rely on certain access to courts cases, such as *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir 1997), and *Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998). However, both cases involved government cover ups which occurred *after* the shootings in question had already happened. Thus the harm caused was merely the delay of an action for

damages. No possibility of injunctive relief to prevent the original harm had ever existed, and thus was never lost.

For these same reasons, the Petitioners' arguments regarding claims for spoliation of evidence and similar torts are untenable. The *Swekel* court did note that such remedies might be a way to supplement any damages caused by the improper delay of the plaintiffs' money damages claims. However, in this case, the cause of action was destroyed, not merely delayed. Suggesting that such a common law tort claim may substitute for federal court determination of the right to access to the courts, deemed fundamental since *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907) is unreasonable. Such a practice would place the most basic interpretations of the United States constitution beyond the reach of the federal judiciary and fundamental constitutional rights would, for all practical purposes, be displaced by state tort law.

E. Ms. Harbury's Claims Are Not Barred by the Doctrine of Parratt v. Taylor .

The government Petitioners also make the rather remarkable claim that Ms. Harbury is barred by *Parratt v. Taylor*, 451 U.S. 527 (1981) from asserting a claim for her lost 1993 case, and instead must be satisfied with any remaining state remedies.

The *Parratt* case requires no such result. The plaintiff in *Parratt* was an inmate who ordered a $23.50

hobby kit which was either stolen or misplaced. This Court noted that the key question presented was not whether due process applied, but what process was due. Given the impossibility of providing a hearing prior to unforeseeable deprivations of property, the Court ruled that a post deprivation hearing provided by state law, providing full reimbursement for the $23.50 loss, was sufficient.

In the cases following *Parratt* , the Supreme Court has consistently taken into consideration the State's ability to actually give a pre-deprivation hearing, and the adequacy of the remedy provided (*Hudson v. Palmer*, 468 U.S. 517 (1984)), *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). Taken together, these cases hold that when a person is deprived of a non- fundamental property interest, due process is required. However, where the State cannot foresee the timing of a random deprivation, a post- deprivation hearing and the provision of an adequate remedy by state law , will satisfy the constitution. Thus in *Logan v. Zimmerman Brush Company* , 455 U.S. 422 (1982), where the state remedy was deemed inadequate for lack of provision for reinstatement, *Parratt* was inapplicable.

It is difficult to identify any relevance of these cases . It was not "impracticable" for the government officials to offer Ms. Harbury a "pre-deprivation hearing." To the contrary, the Petitioners here had many months, if not far longer, to permit Ms. Harbury to approach the courts. Instead they chose to obstruct her.

Nor are the *Parratt* decisions regarding adequate state remedies relevant here. In all of those cases, the plaintiffs' claims were, in the first place, claims for money damages. As the state legal systems also provided for similar, if not identical, awards of money damages, such remedies were found adequate. However, as *Logan* made clear, a monetary award will not constitute the qualitative equivalent of injunctive relief to prevent irreparable harm.

F. A Remedy for the Access to Courts Violation Presented Here Will Not Interfere with Foreign Affairs or Otherwise Chill Any Discretionary Functions of Government Officials.

Petitioners urge that a favorable ruling in this case will unduly interfere with matters of foreign affairs or military operations. These matters were raised for the first time on appeal, and the D.C. Circuit, noting that "fact finding is the basic responsibility of the district court", properly ruled that such claims must first be presented to the lower court for a full hearing and resolution. (Denial of Rehearing, p. 957). See *Pullman-Standard v. Swint*, 456 U.S. 273, 291-291, (1982) Ms. Harbury does indeed dispute the existence of any such bona fide foreign affairs or military concerns here, and would seek to present evidence to the lower court regarding her claims of pretext. Numerous factual disputes are presented.

The purpose of a motion under Rule 12(b)(6) is to test the sufficiency of the statement of a claim for relief

and is not a mechanism for the resolution of a factual dispute. As stated by this Court in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conversely, if a determination of disputed fact is required, dismissal under Rule 12(b)(6) is improper. *Johnson v. Revenue Management*, 169 F.3d 1057, 1059 (7th Cir. 1999). Given the availability of the summary judgment mechanism, the Petitioners would not be subjected to undue delays or expenses. Moreover, it is only after such a full presentation that the foreign affairs question may be determined. The Petitioners cannot act as both litigants and final arbitrator in this case. *United States v. Reynolds*, 345 U.S. 1, 8 (1953).

Ms. Harbury would simply note here that a proper remedy in this case would in no way interfere with the government's conduct of foreign affairs. The sole claim presented in this case is whether or not U.S. officials may, through affirmative acts of deception, prevent a citizen from filing suit against the government for emergency relief. The courts are not asked to evaluate the history of American foreign policies or diplomatic decisions in Guatemala, to question or prohibit military aid or the even the use of informants. No requirements for change or reform are in question.

Nor will the provision of a remedy create any chilling effect on the ability of our diplomatic corps in

the exercise of their day to day duties. Petitioners strongly urge that U.S. officials must be free to give nuanced and sometimes even evasive answers in certain circumstances. The appellate court ruling in this case in no way forecloses any needed flexibility. Nuances and finesses will remain permissible as long as they are not issued with the specific intent of barring access to the courts. Moreover, the line between accepted and forbidden deceptions are brightly drawn by the common law principles of deceit. An official, having offered to assist, is precluded from making deceptive statements, knowing that the person will rely thereon to his detriment Given the clear and limited parameters of such prohibited conduct, there should be no chilling effect other than the desired deterrence of unconstitutional actions. Meanwhile, officials remain free to avoid comment on delicate issues, remain silent, or assert a glomar denial.

Lastly it is noted that a remedy based on the underlying facts of this case harmonizes with long standing American foreign policy principles and priorities. The United States has always condemned and prohibited torture, as discussed above. Congress emphasized this position in 1992, enacting the Torture Victim Protection Act of 1991, Pub.L. No. 102-256, 106 State. 73 (1992) (codified at 28 U.S.C. §1350). As stated in the legislative reports accompanying the statute, "Official torture and summary execution violate the standards accepted by virtually every nation." S. Rep. No. 249, 102d Cong., 1st session, (1991); H.R. Rep. No. 367, 102nd Cong., 1st session pt.1 (1991). See also, the

International Covenant on Political and Civil Rights, ratified in 1992, art.7, 1966 S. Treaty Doc. No. 95-2, 999 U.N.T.. 171. In 1992 the United States also ratified the International Covenant on Political and Civil Rights, (1966), S. Treaty Doc. No. 95-2, 999 U.N.T.S. 171. The Geneva Convention, article 3, 130 has prohibited torture for many decades. 6 U.S.T. 3316, T.I.A.S. No. 3364.

G. A Bivens Remedy Is Fully Appropriate Here; the FOIA System Provides No Adequate Cause of Action or Remedy.

Petitioners also assert that because the Freedom of Information Act provides for extensive and detailed regulation of the flow of information concerning government activities, no independent *Bivens* claim under the United States Constitution is proper here.

At the outset, Ms. Harbury notes that this argument is unrelated to the questions presented to this Court for consideration in this case, and is raised for the first time in the Petitioners' brief on the merits. It has never been presented to the courts below, and is thus improperly included here. Without waiving her position in this regard, she responds as follows.

In 1971 this Court ruled in *Bivens v. Six Unknown Named Agents of the Federal Narcotics Bureau,* 403 U.S. 388, that a plaintiff may sue federal officers for money damages directly under the constitution for violations of the Fourth Amendment. The ruling was carefully limited, and a number of factors were set forth. In *Davis*

v. Passman, 442 U.S. 228 (1979), the Bivens remedy was specifically extended to the Fifth Amendment in the context of a discriminatory discharge. Significantly, the Court found that the plaintiff had no other adequate remedy., as her former employer was no longer in office, and injunctive relief was thus unavailable.

Lastly in *Carlson v. Green*, 446 U.S. 14, (1980), the Court declared that the availability of a claim under the Federal Tort Claims Act would not bar a Bivens remedy for a constitutional violation. Thus Respondent's remaining claims in the court below in no way displaces her cause of action for violation of access to the courts. Nor do the Federal Tort Claims Act exemptions indicate a Congressional intent to shield intentional torts or acts of deceit. To the contrary, the Act specifically waives exclusivity with respect to unconstitutional actions. 28 U.S.C. 2679(b)(2).

Although the Court has taken care to curb undue extensions of the Bivens doctrine over the years, none of those cases is apposite here. *Correctional Services v. Malesko*, 122 S.Ct. 515, 151 L.Ed 2d 456 (2001), and *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471 (1994) both refused to extend Bivens claims to agencies, as a key function of the Bivens remedy is deterrence of the abuse of power by individual federal officials. The egregious violations here warrant such deterrent effect.

As discussed above, there are no special considerations counseling hesitation here. The courts are not asked to evaluate the wisdom of our foreign

affairs history in Guatemala. Nor are special military issues in question, as in *Chappell v. Wallace*, 462 U.S. 296, (1983). Neither Petitioners nor Ms. Harbury are members of the military. Moreover, even in *Chappell*, the plaintiff was provided with an adequate remedy, including retroactive back pay and promotion.

The Petitioners also urge that the FOIA statute itself is the sort of comprehensive scheme described in *Bivens* as a basis for avoiding a constitutional remedy, citing *Bush v. Lucas*, 462 U.S. 367 (1983). In that case, a NASA engineer sued for retaliatory demotion. The Civil Service Commission had already restored his position, with backpay. This Court recognized that Congress had established a complete system of remedies for federal employees, which had more than adequately protected the plaintiff's constitutional rights. In *Schweiker v. Chilicky*, 487 U.S. 412 (1988) the plaintiffs' benefits had been wrongfully terminated but then reinstated. Noting the detailed nature of Social Security system, and the provision of a constitutionally adequate, though not identical, remedy, the Court declined to fashion an additional *Bivens* remedy.

In attempting to apply these rulings, Petitioners overlook the fact that Ms. Harbury has been left with no adequate remedy at all for her lost day in court. By referring her to her FOIA remedies, they again misunderstand the basic nature of her complaint. Had the Petitioners, 1993, simply refused to respond to her questions, or issued a glomar denial, then her remedy, might well be embodied in that statute. The FOIA

provisions do not begin address issues of intentional acts of deception geared to prevent a citizen from filing suit against the government. Petitioners may not, for years, falsely insist that no information exists in order to prevent such an urgent suit, then defend on the grounds that Ms. Harbury should have either guessed that they were deceiving her or filed a FOIA request anyway for such "non existant" files. Nor does the FOIA offer any remedy which can make whole the loss of this fundamental and long recognized constitutional right to access to the courts. See *Jones v. FBI*, 41 F.3d 238, 246 (6th Cir. 1984)(FOIA not intended as primary vehicle for prosecuting agency misbehavior). Given this reality, the Petitioner's argument is contradicted by *Bush*, *Chilicky* and even *Chappell*, in which substantial and adequate remedies had already been provided.

Public policy concerns also weigh strongly against the Petitioners' FOIA argument here. If accepted, federal officials engaging in unconstitutional or rogue operations could first conceal their actions, utilizing deception to prevent discovery or even the initiation of any FOIA proceedings, in order to avoid being subjected to a suit. They could then defend with the very FOIA provisions they themselves had thwarted to prevent any judicial review. In short, they could twice evade the courts.

The *Bivens* remedy was created precisely for the situation at hand, where a strong need for deterrence is coupled with a complete lack of alternate remedies.

II. THE CONSTITUTIONAL RIGHT AT ISSUE WAS CLEARLY ESTABLISHED; AND QUALIFIED IMMUNITIES DO NOT APPLY

Petitioners violated Ms. Harbury's constitutional right of access to the courts when, as she alleges, they intentionally deceived her about her husband's plight in order to prevent her from seeking emergency legal redress. They are not protected from liability by qualified immunity, because the right was "clearly established"at the time they acted, *Anderson v. Creighton*, 483 US. 635, 639 (1987), and a reasonable official would have understood that those actions violated the Constitution. *Id.*; *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

Qualified immunity has developed through a careful balancing of two competing values, the need to protect citizens from unlawful acts of government officials, and the need of officials to perform their duties without the constant fear of insubstantial lawsuits. *Harlow v. Fitzgerald*, 457 U.S. at 807; *Butz v. Economou*, 438 U.S. 478, 504-06 (1978). Petitioners emphasize the second of these important goals but fail to acknowledge the first. *Elder v. Holloway*, 510 U.S. 510, 515 (1994); *Correctional Services Corporation v. Malesko*, 122 S.Ct. 515, 521, 522 (2001). In the interest of deterrence, the qualified immunity standard intentionally imposes some burden on government officials, forcing them to pause to consider whether a proposed course of action can be squared with the Constitution. *Mitchell v. Forsyth*, 472 U.S. 511, 524

(1985). As explained in *Mitchell* this is precisely the point.

A government official will be held personally liable for a constitutional violation where the legal rules were clearly established at the time of the acts in question. *Anderson v. Creighton*, 483 US. at 639; *Harlow v. Fitzgerald*, 457 U.S. at 819. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. It is not necessary that the law have been applied in identical circumstances, *Anderson* at 640, *Mitchell* at 535, n.12. See also *United States v. Lanier*, 520 U.S. 259 (1997).

"[T]he appropriate question is the objective inquiry into whether a reasonable officer could have believed that the challenged conduct was lawful." *Wilson v. Layne*, 526 U.S. 603, 615 (1999).

Here, the relevant question is whether a reasonable government official, knowing that respondent's husband was alive and suffering torture by U.S. government agents, could have believed that it was lawful to deceive her, to prevent her from seeking judicial relief to save his life. The answer can only be no.

By 1993 it was well-established that a cover-up that prevented a U.S. citizen from filing a lawsuit would violate the Constitution. As long ago as *Marbury v. Madison*, 1 cranch 137, (1803), this Court has ruled that "The very essence of civil liberty certainly consists

in the right of every individual to claim the protection of the laws." Moreover, the obstruction or concealment of crucial information or evidence has been deemed a violation of the right to access to a fair hearing for decades, as discussed in the numerous rulings of this Court cited above. See *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983). *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986)

No reasonable official could have thought it constitutional to intentionally deceive a U.S. citizen about the torture and imminent murder of her husband at government hands, to avoid suit for emergency injunctive relief. Indeed, such conduct in and of itself shocks the conscience. Such startling actions clearly weigh in favor of deterrence, and the protection of the citizenry from abuses of power by individual officials. Qualified immunity is inappropriate in this case.

CONCLUSION

Ms. Harbury has clearly stated a cause of action upon which relief may be granted; specifically, that her constitutional right to access to the courts of law was violated by the Petitioners. Such rights were clearly established at the time of the violations, and Petitioners are not entitled to qualified immunity. The decision of the circuit court should be affirmed, and this case should be remanded to the United States District Court for further proceedings.

February 2002

Respectfully submitted,

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Respondent in propria persona

APPENDICES

APPENDIX
TABLE OF CONTENTS

ITEM PAGE(S)

Appendix A :
Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, Article 3, 6 U.S.T. 3316, T.I.A.S. No. 3364 ..... A-1

Appendix B:
State Department Letter to U.S. Sen. Brown, dated Nov.9, 1993
May 11, 1998 Hearing before the Subcommittee on Government Management, Information and Technology, U.S. House of Representatives, 105th Congress, 2nd Session, transcript, pp. 66-67 ..... B-1

Appendix C:
Declassified Memo, U.S. Department of State dated March 29, 1995.
May 11, 1998 Hearing before the Subcommittee on Government Management, Information and Technology, U.S. House of Representatives, 105th Congress, 2nd Session, transcript, p. 112 ..... C-1

APPENDIX A

APPENDIX A

Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, art. 3, 6 U.S.T. 3316, T.I.A.S. No. 3364 :

Article 3 : In the case of armed conflict not of an international character occurring the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions :
(1) Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without adverse distinction founded on race, colour, religion, or faith, sex, birth, or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people.

APPENDIX B

APPENDIX B

ACCESS TO GOVERNMENT INFORMATION AND H.R. 2635, HUMAN RIGHTS INFORMATION ACT

Hearing
Before the
Subcommittee on Government Management, Information, and Technology
of the
Committee on Government Reform and Oversight
House of Representatives
One Hundred Fifth Congress
Second Session
on
H.R. 2635
To provide a process for declassifying on an expedited basis certain documents relating to human rights abuses in Guatemala and Honduras

---

May 11, 1998

Serial No. 105-175

Printed for the use of the Committee on Government Reform and Oversight

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United Stated Department of State
Washington, D.C. 20520

November 9, 1993

Dear Senator Brown:

Thank you for your letter of October 12 informing us of the concerns of your constituent _____ regarding the wherabouts of Efrain Bamaca Valasquez.

Mr. Efrain Bamaca Velasquez, a top field Commander of the Guatemala National Revolutionary Unity (URNG), and believed to be personally close to Guerilla leader Rodrigo Asturias (aka "Gasper Ilom"), disappeared after a March 12, 1992 clash with an Army unit near Retalhuleu. Shortly thereafter, the URNG made discreet inquiries concerning his whereabouts and learned he reportedly had been buried after the clash in an anonymous grave nearby. In February 1993, two URNG guerillas claimed in Geneva that they had been held in clandestine Guatemalan Army prisons before escaping. The guerillas claimed to have seen Mr. Bamaca in March and July, 1992.

The Office of the Human Rights Ombudsman assisted with exhumation arrangements last year, but

then-Attorney General Acisclo Valladares appeared at the scene and suspended proceedings, allegedly because there was no way to identify the exhumed body. Ms. Jennifer Harbury, wife of Mr. Bamaca, contacted the Embassy on March 9, to request assistance in determining Mr. Bamaca's whereabouts.

On August 17, a U.S. forensic expert and a Guatemalan forensic team participated in the exhumation of the grave in Retalhuleu. Ms. Harbury, a representative of the U.S. Consular Section of the US Embassy in Guatemala, and international human rights observers were also present. Following an exhaustive effort, all present concluded that the body in the grave was not that of Efrain Bamaca Velasquez. Our embassy has been assured by Guatemalan authorities that Mr. Bamaca's case will remain open until he is found.

The Honorable Hank Brown,
United States Senate

We have no independent information confirming the existence of clandestine Guatemalan military prisons. We note, however, that America's Watch recently prepared a report documenting several cases in which persons claimed to have been held in secret army jails. We have no independent information regarding the whereabouts of Mr. Bamaca.

As you know, Guatemala's constitutional crisis was resolved with the election by the Guatemalan Congress of highly respected former Human Rights Ombudsman Ramiro de Leon Carpio as President on June 6. We believe that President de Leon represents the best hope in a generation of realizing fundamental change in the political culture of Guatemala. We will continue to support President de Leon's efforts to improve the human rights situation in his country.

I hope that this information has been of help in responding to your constituent. Please contact me if I can be of further assistance.

Sincerely,

Wendy R. Sherman
Assistant Secretary
Legislative Affairs

Enclosure:
Correspondence returned

APPENDIX C

APPENDIX C

ACCESS TO GOVERNMENT INFORMATION AND H.R. 2635, HUMAN RIGHTS INFORMATION ACT

Hearing
Before the
Subcommittee on Government Management,
information, and technology
of the
Committee on Government Reform and Oversight
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VS OFFICE

Package Subject: Q&A Problem

Item Title: Q&A Problem

3-29-95, 8:25am

We should not use the "legally proscribed from releasing classified intelligence to private individuals . . . language" I suggested yesterday; I'm sorry I steered you wrong on this. After our exchange of a e mails I consulted INR's person in L. His comments are attached and make sense. Their view, in short, is that we (the exec. branch) could have made a decision to declassify the intell and share it with Harbury.

Sorry,

ps-let me know if I need to call anyone on the 7th fl. to correct this.

(11)

Supreme Court, U.S.
FILED
MAR 11 2002
CLERK

No. 01-394

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

WARREN CHRISTOPHER, MARILYN MCAFEE, ALEXANDER WATSON, ANNE PATTERSON, PEG WILLINGHAM, ANTHONY LAKE, and RICHARD E. FEINBERG,

Petitioners,

v.

JENNIFER K. HARBURY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

---

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

I. RESPONDENT DOES NOT STATE A VALID CLAIM BASED ON THE RIGHT OF ACCESS TO THE COURTS IN THIS *BIVENS* ACTION 1

A. Respondent's Due Process Claim Would Apply to Much Routine Conduct and Would Anchor a Wide Range of Dubious Legal Claims 1

B. Respondent's Substantive Due Process Claim Lacks Precedential Support 8

C. Respondent Has No Due Process Claim Since She Was Never Denied Access to the Courts 10

D. Respondent Has No Cognizable *Bivens* Action . 12

III. QUALIFIED IMMUNITY IS APPROPRIATE 17

CONCLUSION 20

TABLE OF AUTHORITIES

PAGE

Cases

Albright v. Oliver, 510 U.S. 266 (1994) 10
Barrett v. United States, 798 F.2d 565 (2d Cir. 1986) . 17, 18
Bell v. City of Milwaukee,
746 F.2d 1205 (7th Cir. 1984) 17, 18, 19
Bivens v. Six Unknown Named Agents,
403 U.S. 388 (1971) ..... *passim*
Bounds v. Smith, 430 U.S. 817 (1977) 9
Brady v. Maryland, 373 U.S. 83 (1963) 8
Bush v. Lucas, 462 U.S. 367 (1983) 13, 14, 15
Caterpillar, Inc. v. Lewis, 519 U.S. 61 (1996) 13
Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.,
333 U.S. 103 (1948) 18
Collins v. City of Harker Heights, 503 U.S. 115 (1992) ... 8
Correctional Servs. Corp. v. Malesko,
122 S. Ct. 515 (2001) 13, 14
Crawford-El v. Britton, 523 U.S. 574 (1998) 6
Crowder v. Sinyard, 884 F.2d 804 (5th Cir. 1989),
cert. denied, 496 U.S. 924 (1990) 9, 10, 19
Davis v. Passman, 442 U.S. 228 (1979) 13, 14
Delew v. Wagner, 143 F.3d 1219 (9th Cir. 1998) 10, 19
DeShaney v. Winnebago County Dep't of Social Servs.,
489 U.S. 189 (1989) 8, 9
Ellis v. Magee & Devereux, 2001 WL 167744
(E.D. La. Feb. 15, 2001) 19
FDIC v. Meyer, 510 U.S. 471 (1994) 16
Foster v. City of Lake Jackson,
28 F.3d 425 (5th Cir. 1994) 19
Kyles v. Whitley, 514 U.S. 419 (1995) 8
Lassiter v. Department of Social Servs.,
452 U.S. 18 (1981) 8
Lebron v. National R. Passenger Corp.,
513 U.S. 374 (1995) 13

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

Lewis v. Casey, 518 U.S. 343 (1996) 8, 9
Little v. Streater, 452 U.S. 1 (1981) 8
Linda R.S. v. Richard D., 410 U.S. 614 (1973) 11
Malley v. Briggs, 475 U.S. 335 (1986) 20
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) ... 9, 17
M.L.B. v. S.L.J., 519 U.S. 102 (1996) 8
Office of Personnel Mgmt. v. Richmond,
496 U.S. 414 (1990) 16
Ohio v. Robinette, 519 U.S. 33 (1996) 13
Papasan v. Allain, 478 U.S. 265 (1986) 12
Parratt v. Taylor, 451 U.S. 527 (1981) 10
Procunier v. Navarette, 434 U.S. 555 (1978) 19
Reno v. Catholic Social Servs., Inc.,
509 U.S. 43 (1993) 13
Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983) .. 17, 18, 19
Saucier v. Katz, 121 S. Ct. 2151 (2001) 19
Schweiker v. Chilicky, 487 U.S. 412 (1988) 13, 14, 15
Simon v. Eastern Ky. Welfare Rights Org.,
426 U.S. 26 (1976) 11
Swekel v. City of River Rouge,
119 F.3d 1259 (6th Cir. 1997) 10, 19
United States v. Verdugo-Urquidez,
494 U.S. 259 (1990) 16
Washington v. Glucksberg, 521 U.S. 702 (1997) 9
Wilson v. Layne, 526 U.S. 603 (1999) 20
Yee v. Escondido, 503 U.S. 519 (1992) 13

TABLE OF AUTHORITIES
(continued)

PAGE

Constitutional Provisions, Statutes, and Rules

U.S. CONST. amend. V ..... *passim*
S. Ct. R. 14.1(a) 13
Freedom of Information Act, 5 U.S.C. § 552 ..... *passim*
5 U.S.C. § 552(a)(3) 14
5 U.S.C. § 552(a)(4)(E) 14
5 U.S.C. § 552(a)(4)(F) 15
5 U.S.C. § 552(a)(6)(A) 14
5 U.S.C. § 552(a)(6)(E) 14
5 U.S.C. § 1216(a)(3) 15

REPLY BRIEF FOR PETITIONERS

Respondent's brief highlights the expansive scope of the constitutional claim she asserts in this case, for her unbounded allegations could arise just as easily in the wake of countless routine encounters between citizens and public officials. Moreover, her formulation of the substantive due process right effectively sweeps in a wide range of otherwise dubious legal claims and remedies – whether or not they were pursued or are even credible. The entire discussion thus demonstrates that her alleged right-of-access claim is not a narrow constitutional path for individuals who are barred from accessing the courts, but a broad legal boulevard that would permit redress against any government official who does not affirmatively aid an inquiring citizen, even when under no legal duty to do so. Respondent clearly does not state a proper claim for relief in this case and, even if she did, petitioners are entitled to qualified immunity.

I. RESPONDENT DOES NOT STATE A VALID CLAIM BASED ON THE RIGHT OF ACCESS TO THE COURTS IN THIS *BIVENS* ACTION.

A. Respondent's Due Process Claim Would Apply to Much Routine Conduct and Would Anchor a Wide Range of Dubious Legal Claims.

The recurring theme in the arguments of respondent and her *amici* is that this is an extraordinary case involving allegations of shockingly egregious misconduct – *i.e.*, that petitioners knew about and were complicit in the alleged torture and murder of Bamaca. These sensational characterizations serve two functions. First, they falsely portray petitioners in the most corrupt and monstrous terms. Second, and more important, they suggest to the Court that affirmance of the decision below would have little practical effect, because the facts are so extreme and unusual. The aim is thus to reassure the Court that it can recognize the newfangled right-of-access claim advanced by respondent with minimal doctrinal disturbance. *See, e.g.*, ACLU Br. 2-4 (given the ostensibly "exceptional factual allegations" here, it is vital to "refrain from reaching out for

complex and far-reaching issues" involving the right of access). This suggestion, however, is demonstrably incorrect; in fact, the ruling below is inherently far-reaching because, among other things, it triggers constitutional claims based on allegations that could be launched in the wake of virtually any request for information made to a government official.

Respondent's complaint lays out a broad-based attack on American policy in Guatemala over the last decade, including widespread accusations of complicity in various misdeeds by officials at the CIA, NSC, and Department of State. With these generalized accusations as a platform, respondent and her *amici* aver that petitioners lied repeatedly to prevent respondent from pursuing legal remedies when they personally knew that Bamaca was even then alive and being tortured by CIA operatives. *See, e.g.*, Resp. Br. 2-5; BCJ Br. 3-4; ACLU Br. 2-3.

On closer scrutiny, even under the indulgent standards that apply at this threshold stage, these characterizations are reckless, if not fanciful. The actual record before the Court advances a far less colorful and far more commonplace set of allegations with respect to these petitioners. Thus, a review of the complaint in this case yields, at most, the following allegations that touch on *petitioners'* actual conduct:

> (1) in March of 1993, after respondent learned from an escaped prisoner that her husband was alive and being tortured, she contacted some State Department officials (apparently *not* petitioners), told them what she had learned, and asked for information about her husband. The unidentified officials promised to look into the matter and assist her, but never provided her any information. *See* J.A. 29-30 (Complaint ¶¶ 55-58);

> (2) in August of 1993 – at most a month before Bamaca's death, if not after it[1] – respondent opened Bamaca's grave and discovered the body was not his. She immediately informed petitioner McAfee, who said she would investigate the matter and keep respondent informed, but never provided her any information. *See id.* at 30-31 (Complaint ¶¶ 60-64); and
>
> (3) in November 1994 (well after Bamaca's death), petitioner Lake told respondent, incorrectly, that no further information existed about Bamaca. *See id.* at 34 (Complaint ¶¶ 83).

These alleged acts of deception bear no resemblance to the "extraordinary" instances of "egregious" misconduct that respondents and her *amici* assert as grounds for this lawsuit. Indeed, it is hard to imagine an informal request for information, such as respondent's, that could *not* give rise to an allegation that the government official promised, falsely, to give more help than he did or asserted that he had less information than was actually available, with at least some intent to avoid litigation. While respondent insists that a so-called *Glomar* response of "no comment" would be fully acceptable, Resp. Br. 21-22, even

---

[1] Based on respondent's allegations in the complaint, Bamaca died no later than September of 1993 – when, according to the complaint, the Defense Intelligence Agency reported that he had been executed. *See* J.A. 31 (Complaint ¶ 66); *see id.* at 27 (Complaint ¶ 36) (stating that Bamaca was detained and tortured for "approximately one year" following his capture in March of 1992). That time frame, of course, poses nearly insuperable obstacles for respondent's claim that but for petitioners' alleged lies, she would have executed a dizzying series of maneuvers that would have inexplicably resulted in preventing Bamaca's death at the hands of the Guatemalan army, since the entire chain of events would have had to occur in at most one month. Hence respondent now asserts – with no explanation and in direct contradiction of her own complaint and the record before the Court – that there is "[n]ew evidence suggesting that Mr. Bamaca in fact survived well into 1994 if not longer." Resp. Br. 23 n.3.

this response would not immunize the official if the plaintiff alleged that it was made with an intent to conceal information in order to forestall a lawsuit. The critical point here is not that petitioners' alleged misconduct (none of which, of course, has been proved) is more benign than portrayed. It is rather that the same kinds of allegations routinely can be made, and in fact are made, of any government official who fields a request for information. Thus, the vague limiting principle that respondent and her *amici* suggest for the ruling below – that it applies only in extraordinary cases of egregious misconduct – vanishes in light of the garden-variety allegations actually presented here.

But the scope of respondent's asserted constitutional claim goes from broad to breathtaking in view of the state-of-mind component adopted by the court of appeals and urged here by respondent and *amici*. Under this theory, a plaintiff need only allege that a deceptive statement by a government official impaired her ability to bring a legal claim or to secure a legal remedy, and that at least one of the motives for the deception was to prevent a suit against the government.[2]

As our opening brief detailed, such a claim by its terms could apply to a wide range of vital and unexceptionable government conduct, including undercover investigations and sting operations, cagey replies to requests for information about military or covert operations, and deflections of inquiries about contemplated regulatory action. *See* Petr. Br. 18-21.

Respondents and her *amici* have no tenable response. They recognize the illegitimacy of chilling such conduct, but demur that the examples are beside the point because they all pertain to alleged deceptions for admirable purposes. *See, e.g.*, Resp. Br. 19 (conceding need for "appropriate investigation techniques" in law enforcement); BCJ Br. 13-14. This response could not

[2] Respondent and her *amici* do not contest petitioners' observation that the ruling below would apply whenever a plaintiff could allege that some irreparable harm occurred as a result of a government official's nondisclosure or misstatement of information. *See* Petr. Br. 19.

be more wrong; indeed, it proves the very point it is supposed to rebut.

In particular, the response completely fails to address what is perhaps the most problematic aspect of the ruling below: under the elastic standard asserted by respondent and accepted by the court below, a plaintiff need only allege that, regardless of any other good intentions, the government official had *some further* motivation of avoiding a lawsuit. *See* Pet. App. 23a. The examples cited above may well involve only "good" motives,[3] but there is *absolutely no way to establish that fact* at the motion to dismiss stage, particularly since, as the court of appeals emphasized, "*any* ambiguities or doubts . . . must be resolved in favor of the pleader." Pet. App. 63a (emphasis original; quotation omitted). When the mixed-motive standard embraced by the court of appeals is combined with the permissive pleading rules that govern motions to dismiss, any such claim must proceed into litigation as long as the plaintiff has made the essentially unrebuttable allegation that the official had *some* motive to avoid a lawsuit.[4] Each of the hypotheticals that respondent and *amici* insist are fully constitutional becomes

[3] In fact, many such "good motives" – for example, preserving confidentiality – would necessarily entail preventing or delaying a lawsuit and hence, on the theory pressed by respondent and adopted by the court below, would give rise to a constitutional violation.

[4] Under the terms of the ruling below, a government official would be liable for a constitutional violation for making an allegedly deceptive statement for objectively unimpeachable reasons – such as protecting an informant's identity in an ongoing undercover investigation – if it so happened that the official also harbored some subjective motivation to prevent a lawsuit, which might even be essential to safeguard the success of the investigation. One of the *amici* says so explicitly: "That is not to say, however, that an official can avoid liability merely by asserting that his ultimate purpose was legitimate. Legitimate purposes may not be achieved via unlawful means." BCJ Br. 17. Of course, the defining characteristic of the asserted "unlawfulness" here is the objective – in whole or in part – to forestall a lawsuit.

presumptively unconstitutional (sufficient, that is, to survive a motion to dismiss) with the mere addition of such an irrefutable allegation. And if allegations about "an official's state of mind" are notoriously "easy to allege and hard to disprove," *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998), allegations that an official harbored some stain of improper motive are easier yet to allege, and harder if not impossible to disprove, without invoking the extensive apparatus of civil litigation.[5]

The constitutional claim advocated by respondent is yet more elastic. As framed by respondent and the court below, the right-of-access claim would comprehend a vast expanse of other constitutional, statutory, and common-law claims, however remote and tenuous.

Respondent's brief vividly illustrates the immense reach and flexibility of the asserted constitutional right. *See* Resp. Br. 24-33. She sets out a skein of hypothetical legal claims and remedies that she now asserts she might have pursued but for petitioners' alleged improper concealments. These include (among others) a substantive due process claim for deprivation of her "protected liberty interests in the orderly pursuit of happiness" (*id.* at 25); a claim for abridgement of her liberty

[5] *Amici* relies on *Crawford-El* to suggest that any concerns about the broad scope of respondent's unprecedented claim can be mitigated by other judicial strategies, such as enforcing the causation requirement or exercising control over discovery. *See* BCJ Br. 15-16. In *Crawford-El*, however, the Court simply declined to fashion a heightened burden of proof for established constitutional claims involving allegations of improper motive. *See* 523 U.S. at 584-601. The case in no way supports recognition of a new constitutional claim hinging entirely on allegations of partial bad motive, nor does it address the anomaly, as a matter of interpretation, of announcing a new substantive due process rule that reaches a wide range of routine and often vital government conduct. Indeed, the fact-driven "burden-shifting" procedure suggested by the *amici* confirm that bare allegations about mixed motives would propel many dubious and hypothetical claims past the initial threshold and into the arena of full-blown litigation. *See* BCJ Br. 16.

interest in having Congress insist on Bamaca's "humanitarian treatment or his right to a fair trial" (*id.* at 24); a claim for violation of her fundamental rights to marry, remain married, and preserve her family under the "penumbra of privacy" extended to "all aspects of family affairs" (*id.* at 26); and criminal conspiracy by government officials to torture Bamaca in violation of the due process "shocks the conscience" test (*id.* at 28-30). Based on these claims, she asserts that she would have sought a declaratory judgment and "[i]njunctive relief requiring that all remaining information regarding Mr. Bamaca be immediately transferred to the United States Congress so that its members might assist Ms. Harbury through appropriate diplomatic channels," and prohibiting "the failure to properly supervise assets engaged in Mr. Bamaca's torture." *Id.* at 32.[6]

As the Court is well aware, a number of these theories rest on shaky if not discredited legal ground, but our point here is not to belittle the various claims that she now propounds. To the contrary, the salient point is that under the ruling below, even highly questionable and largely conjectural legal claims can found the basis for a constitutional violation, though ultimately they might well have proven meritless. Respondent concedes as much, asserting that a right-of-access claim must be allowed to proceed as long as the underlying claim that would have been brought satisfies a "reasonable basis" test. Resp. Br. 33. The claim thus works a remarkable kind of doctrinal alchemy, transforming legal dross into good constitutional currency.

Thus, the constitutional claim minted in the court of appeals plainly extends well beyond occasional "extraordinary" cases of "egregious" misconduct. The claim, in fact, would apply to a wide swath of routine interactions with government officials (as this case actually illustrates). In addition, respondent's brief

[6] It is telling that these scattershot claims are entirely different from the theory she asserted in the court of appeals, which was that she could have sought an emergency injunction in a state-law tort action for intentional infliction of emotional distress. *See* Pet. App. 24a.

shows that her expansive version of the right-of-access claim can be premised on a salvage yard of underlying legal claims, whose hypothetical reach is virtually boundless. The Court has resisted just such pitfalls by remaining "reluctant to expand the concept of substantive due process, because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). Accordingly, the Court should decline the invitation to announce such an amorphous and wide-ranging supplement to its existing jurisprudence.

B. Respondent's Substantive Due Process Claim Lacks Precedential Support.

Respondent and her *amici* contend that the right-of-access claim asserted in this case is squarely grounded in established precedent and the traditions of Anglo-American law. *See* Resp. Br. 10-17; ATLA Br. 3-11. But their legal snippets, broad pronouncements, interpretive principles, and inapposite criminal precedents do not suffice as a foundation for the substantive due process right asserted in this case. In assessing respondent's constitutional claim, it is decisive that "the Due Process Clauses generally confer no affirmative right to governmental aid." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989); *Lewis v. Casey*, 518 U.S. 343, 354-55 (1996) (Due Process Clause does not require officials to take affirmative steps to enable prisoners to "discover grievances" and "to litigate effectively"). For that is, at bottom, what respondent's right-of-access claim would require.

In addition to the two lines of decisions already analyzed in petitioners' opening brief, *see* Petr. Br. 13-19,[7] respondent cites cases such as *Brady v. Maryland*, 373 U.S. 83 (1963), and

[7] *Little v. Streater*, 452 U.S. 1 (1981), and *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981), both involve "state controls or intrusions on family relationships," *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996). Respondent's claims do not fit within that "narrow category of civil cases." *Id.* at 113. *See* Petr. Br. 14-15.

Kyles v. Whitley, 514 U.S. 419 (1995). These criminal cases of course arise only because the government has initiated compulsory proceedings designed to result in valid deprivations of the defendant's life or liberty. In that particular setting, the due process requirement that exculpatory information be disclosed is imposed to secure the criminal defendant's right to a fair trial. In some loose sense, these decisions thus bear some relation to cases like *Lewis* and *Bounds v. Smith*, 430 U.S. 817 (1977), but none of them even begins to provide a separate right outside the context where "the State's affirmative act of restraining the individual's right to act on his own behalf" constitutes "the 'deprivation of liberty' triggering the protections of the Due Process Clause." *DeShaney*, 489 U.S. at 200. *See generally Crowder v. Sinyard*, 884 F.2d 804, 811-12 (5th Cir. 1989) (explaining why these cases "are of little assistance" in "the world of litigation outside prison walls"), *cert. denied*, 496 U.S. 924 (1990).

Respondent's *amici* has collected a mass of general authorities going all the way back to the Magna Carta in order to bolster "the right to obtain redress from the courts," ATLA Br. 5, including cases applying specialized provisions of state constitutional law and other more venerable precedents such as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *See* ATLA Br. at 3-11; ACLU Br. 8-14. The level of analysis, however, is far too abstract: for example, it surely would have surprised Chief Justice Marshall to learn that the Supreme Court's inability to provide a lawful remedy to right the wrong done to William Marbury would implicate a substantive due process right of access to the courts. *See* 5 U.S. at 163. In the end, these citations offer little to satisfy the demanding standards of "utmost care" that must be applied when the Court is "asked to break new ground in this field" of substantive due process and thereby "place the matter outside the arena of public debate and legislative action." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (quotation omitted).

C. Respondent Has No Due Process Claim Since She Was Never Denied Access to the Courts.

Petitioners also contend that the right-of-access claim asserted by respondent, even if cognizable as a general matter, requires her to show *an actual bar* to her ability to access the courts. In this case, as in *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir. 1997), and *Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998), her claim is not valid unless she can establish that defendant's conduct rendered "'*any* available state court remedy ineffective.'" *Id.* at 1222-23 (quoting *Swekel*, 119 F.3d at 1264) (emphasis added). Because she never even attempted to file suit before bringing her right-of-access claim, though the courts were always open to her, she cannot "show *absolute denial* from state court." *Swekel*, 119 F.3d at 1264 (emphasis added). In short, a claimant cannot establish a violation of the right of access without showing her actual inability to access the courts. No matter how "functional" the due process analysis should be, ACLU Br. 8, this element must be a clear prerequisite to any such claim.

Respondent argues instead that she was not fully armed with the information she needed to pursue and secure an immediate injunction. But the Court has never held that the Due Process Clause guarantees the right to a particular remedy, *see, e.g.*, *Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981); *Crowder*, 884 F.2d at 813-14, and this rule must be the same in both procedural and substantive due process cases, *cf. Albright v. Oliver*, 510 U.S. 266, 285 (1994) (Kennedy, J., concurring). Petitioners have noted that many remedial avenues are available to redress the conduct alleged in this case, *see* Petr. Br. 27-29, and have pointed out that respondent has availed herself of most, if not all, of them, *see id.* at 36 n.13. And though respondent argues that going to court to try to save her husband now that he is already deceased would be "futile," Resp. Br. 33-35, this argument does not attempt to suggest that the courts were not open to her *at the time*, nor does it explain why she should now be able to assert a substantive due process claim

after she simply chose not to pursue her legal remedies, for whatever reason. Indeed, her filings make it clear that she had ample motivation and ability to pursue a legal claim, notwithstanding her allegations of being lulled into inaction.

Because the court of appeals did not insist on any showing of an actual bar to suit, it was forced to traffic in legal hypotheticals about what claims respondent might have brought and what relief she might have obtained. This approach was problematic enough in the court below, but before this Court it has come completely unmoored. With respondent's ingenuity as the only apparent limit, she has now tendered several extravagant new claims in her merits brief. *See* Resp. Br. 22-33.

All of these hypothetical claims, however, suffer from a common defect: respondent cannot meet the minimal threshold for standing to bring suit, which in turn would doom her right-of-access claim. The chain of arguments has been fully set out and will not be repeated here. *See* Petr. Br. 29-33. Respondent and her *amici* have surprisingly little to say here. Respondent rests on mere *ipse dixit* that the judicial relief she hypothesizes would have been secured and that it is "highly probable" the order of a U.S. court "would have been enough to compel Mr. Bamaca's release [by the Guatemalan army] to the courts of law for a fair trial." Resp. Br. 32-33. Her *amici* rest on a bare claim of "actual injury," making no effort to deal with the mandatory causation and redressability prongs of the standing doctrine. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 43 (1976). Most telling of all, neither respondent nor *amici* offers any explanation of how an injunction against federal officials (assuming she somehow managed to surmount the formidable hurdles to securing such an order) could have prevented Bamaca's death at the hands of the Guatemalan military.

It might be argued that such license is permissible on a threshold motion to dismiss. Yet the Court has spoken directly to the limits of such indulgence: "Although, for purposes of this

motion to dismiss, we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 287 (1986). Here the independent decisions of third parties would be involved in the final step toward effective relief, and those third parties – foreign military personnel – are even less amenable to American judicial process than in more typical standing cases. Hence the conclusions respondent asks the Court to draw are simply unsupportable as a matter of law.

In a weak response to this dilemma, respondent and her *amici* make an effort to transform her constitutional claim into a complaint about the failure *timely to disclose* information. *See, e.g.*, Resp. Br. 21 (information should have been "timely disclosed"); *id.* at 16 (she was discouraged from filing FOIA requests sooner); ACLU Br. 2-3 (if not misled, she "would have pursued a FOIA request immediately," learned the truth, and brought suit to save Bamaca). This too fails, both as a factual matter (declassification takes time, and her allegations left only a month at most to complete all the steps needed to secure the relief she ultimately sought) and as a legal matter (adding extra steps to the causal chain complicates standing even further). As the district court correctly noted, an alleged cover-up "cannot prejudice a plaintiff's access to courts if the cause of action contemplated is untenable from the outset." Pet. App. 47a n.4.

D. Respondent Has No Cognizable *Bivens* Action.

In response to the argument that she has no cognizable *Bivens* action, respondent contends that the Court cannot entertain the argument for procedural reasons and that it would be appropriate here to extend *Bivens* to this new context. *See* Resp. Br. 43-46; ACLU Br. 14-25.

The *Bivens* argument, though not separately raised below, is "fairly included" in the first Question Presented: whether respondent has stated a valid claim for "a violation of the constitutional right of access to the courts." Petr. Br. i; *see* S. Ct. R. 14.1(a). This is so because deciding whether her due

process claim can be asserted in a *Bivens* action is "'predicate to an intelligent resolution of the question presented'" of whether she has a valid due process claim in this case, and here the parties have briefed the issue and are able to present argument upon it. *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996) (quoting *Ohio v. Robinette*, 519 U.S. 33, 38 (1996)) (internal quotes omitted). In addition, "'[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. National R. Passenger Corp.*, 513 U.S. 374 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). Finally, the Court's self-imposed caution about implying constitutional remedies where Congress already has provided a comprehensive statutory scheme is a prudential jurisdictional doctrine grounded in the separation of powers. *See, e.g.*, *Bush v. Lucas*, 462 U.S. 367 (1983); *Schweiker v. Chilicky*, 487 U.S. 412 (1988). As such, it can be raised on the Court's own motion and will be considered "fairly included" within the questions presented on the merits, especially when "both parties have touched on it in their briefs." *Reno v. Catholic Social Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993). Thus, the question is appropriate for the Court's resolution here.

On the merits, respondent's defense of her *Bivens* claim is unpersuasive. In *Correctional Servs. Corp. v. Malesko*, 122 S. Ct. 515 (2001), the Court recently stressed its longstanding "caution toward extending *Bivens* remedies into any new context." 122 S. Ct. at 523. In only one case has the Court upheld a *Bivens* claim based on the Due Process Clause, and in that case the claim was for sexual discrimination premised on the equal protection component of the Fifth Amendment's Due Process Clause. *See Davis v. Passman*, 442 U.S. 228, 230-32 (1979). Thus there is no doubt that respondent is asking the courts to extend *Bivens* into a new context here. Furthermore, the Court has stated that it inferred a new *Bivens* action in *Davis* "chiefly because the plaintiff lacked any other remedy for the alleged constitutional deprivation." *Malesko*, 122 S. Ct. at 520;

see Davis, 442 U.S. at 230-33 & n.4. As noted already, respondent has not lacked for remedies through legal, political, and administrative processes, which she has vigorously pursued and continues to pursue. *See* Petr. Br. 27-29 & 36 n.13.

In addition, respondent and her *amici* do not adequately address the "special factors counseling hesitation" in recognizing a *Bivens* claim in the context of this case. *Bush*, 462 U.S. at 380; *Schweiker*, 487 U.S. at 423. A principal "special factor" here is that respondent's due process claim concerns the withholding of information and thus implicates the detailed statutory scheme embodied in the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA").

Periodically throughout her brief, respondent appears to acknowledge that the proper implementation of this statutory mechanism provides the true gravamen of her dissatisfaction with petitioners here. *See, e.g.*, Resp. Br. 16 ("But for this deception, she could have obtained the documents through administrative requests under [FOIA]"); *id.* at 22 (petitioners should have informed her "that information might or might not exist, and she would have swiftly moved to ascertain the matter by resort to FOIA"). Nonetheless, respondent argues that FOIA provides *no* remedies for such claims and that, in any event, her claims transcend the mere withholding of information because they involve deliberate lies allegedly told to her by petitioners. *See* Resp. Br. 45-46.

The first argument never comes to grips with the comprehensive procedural and substantive mechanisms provided in FOIA, which includes, directly contrary to respondent's assertion, detailed avenues for obtaining judicial relief and sanctions against officials who improperly withhold requested information. *See e.g.*, 5 U.S.C. § 552(a)(6)(A) (duties and deadlines to requests for information); *id.* § (a)(6)(E) (expediting requests); *id.* § (a)(3) (*de novo* judicial review with agency bearing burden to justify nondisclosure); *id.* § (a)(4)(E) (attorney fees and other litigation costs for parties who prevail

in court); *id.* § (a)(4)(F) & 5 U.S.C. § 1216(a)(3) (disciplinary measures against officials who withhold information "arbitrarily or capriciously"). FOIA is thus indeed an "elaborate comprehensive scheme that encompasses substantive provisions forbidding arbitrary action . . . and procedures – administrative and judicial – by which improper action may be redressed." *Bush*, 462 U.S. at 385.[8] And the Court has held that any such comprehensive regulatory scheme precludes a *Bivens* remedy as long as it provides meaningful, even if incomplete, relief for alleged constitutional deprivations. *See Schweiker*, 487 U.S. at 425; *Bush*, 462 U.S. at 378.

Respondent's other argument simply distorts the facts alleged in her complaint. She contends that FOIA does not address "issues of intentional acts of deception geared to prevent a citizen from filing suit against the government." Resp. Br. 45-46; *see* ACLU Br. 20-21 (FOIA was "hardly intended to provide a remedy for plaintiffs victimized by affirmative misrepresentations by government"). But the complaint in this case does not allege misrepresentations made on *general topics* or even misrepresentations about the whereabouts and circumstances of Bamaca – instead, it solely concerns alleged misstatements that were made *about whether information existed and what steps would be taken to ascertain and divulge it*. *See supra* pages 2-3; *see also* J.A. 29-31, 34 (Complaint ¶¶ 55-58, 60-64, 83). Treatment of *these* matters is undeniably

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[8] As described in our opening brief, respondent's allegations show that she was well aware of the availability of these legal processes and availed herself of them constantly. *See* Petr. Br. 18 n.3, 36 n.13. Her complaint thus boils down to this: although she knew all along that other information might or might not exist, and although she felt all along that information was being withheld, *see* J.A. 31, 34-35 (Complaint ¶¶ 64, 85), she is now entitled to assert a substantive due process claim because she chose – and perhaps was encouraged – to pursue the matter initially through informal channels rather than through the formal channels that were always available to her, which in hindsight proved more effective.

central to FOIA's statutory scheme with its comprehensive provisions for administrative and judicial relief.[9]

Petitioners have also noted another special factor counseling hesitation here, which is that respondent's suit would require the courts to interfere with "the ability of the political branches to respond to foreign situations involving our national interest." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 273-74 (1990); *see* Petr. Br. 38-39. Respondent's threadbare assertions to the contrary are contradicted by her own allegations elsewhere. *Compare* Resp. Br. 44-45 *with id.* at 31, 42 (invoking "foreign affairs" policies and principles). *Amici*'s arguments that all such matters should be treated by litigating a national security defense (but in any event that such authority "should not become a license to lie to citizens"), ACLU Br. 21-22, provide little reassurance on this point. Respondent's allegations concern whether the highest-ranking State Department and NSC officials may legitimately conceal or withhold information from her – even if necessary through deception – about their knowledge of covert operations amidst a civil war that is taking place in a foreign country. This dispute, which originated in a generalized attack on U.S. policies in Guatemala, doubtless touches directly on the appropriate

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[9] Although respondent does not address the point, her *amici* correctly observe that the impact on the public fisc was not well explained in our opening brief, as the federal treasury would not be *directly* affected by allowing constitutional claims based on nondisclosures and misrepresentations by government officials. *See* ACLU Br. 22-25; BCJ Br. 25. It nevertheless blinks reality to suggest imposing liability in such circumstances would not have a staggering and immediate impact upon the public administration (including the terms on which information is provided to the public, *see Office of Personnel Mgmt v. Richmond*, 496 U.S. 414, 433-34 (1990)) and upon the government's ability to hire and retain hundreds of thousands of employees on the same terms of employment, which in turn would create a "potentially enormous financial burden for the Federal Government." *FDIC v. Meyer*, 510 U.S. 471, 486 (1994).

conduct of U.S. foreign policy. Accordingly, the posture of this case surely counsels hesitation in launching new *Bivens* claims into such perilous and uncharted waters.

III. QUALIFIED IMMUNITY IS APPROPRIATE.

Respondent's arguments that petitioners do not enjoy qualified immunity in light of the unprecedented nature of the ruling below are completely unpersuasive. First, respondent barely even tries to suggest that this Court's precedents foreclose qualified immunity. She briefly adverts back to her discussion of an accused suspect's right to a fair hearing *in a criminal prosecution*, *see* Resp. Br. 49, which is inapposite for the reasons discussed in Section I.B, *supra*. She also offers one extremely general reference to *Marbury* – which, as discussed above, is a case about many things, but which certainly did not establish any substantive due process right of access to the courts. Moreover, respondent never contends that any court of controlling authority within the relevant jurisdiction had ever addressed this issue. In fact, no prior case from the District of the District of Columbia had ever discussed this claim, let alone upheld it, and the lower courts cited no such precedents.

The entirety of respondent's qualified immunity argument rests on her unexplained contention that the trio of lower court decisions in *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986), and *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), had clearly established the unconstitutionality of petitioners' conduct at the time they acted. *See* Resp. Br. 48-49; BCJ Br. 26-30. These decisions were fully canvassed in petitioners' opening brief, together with other case law calling into question the notion that the pertinent authorities were consistent, clear, and settled. *See* Petr. Br. 42-46. But three points deserve further attention here.

First, these cases all concerned situations in which the defendant officials withheld, misrepresented, and even destroyed

information in furtherance of a course of criminal conduct and in violation of their known legal duties. *See Barrett*, 798 F.2d at 575-76 (emphasizing that defendants had allegedly suborned perjury and obstructed discovery in pending litigation, conduct that itself "was also a crime" and thus violated explicit legal duties under "currently prevailing law"); *Bell*, 746 F.2d at 1214-22, 1264-65 (expressly limiting its holding "to the particularly egregious set of facts herein," in which one officer was convicted of homicide and several officers confessed to committing perjury and obstruction of justice); *Ryland*, 708 F.2d at 969-70 (prosecutors falsified evidence and obstructed justice in ongoing criminal investigation, which violated their plain legal duty "to enforce the criminal laws of Louisiana," as well as their obligation as citizens to abide by those laws).

Thus the defendants in each of these cases were guilty of independent criminal violations that deprived plaintiffs of the essential components of the "due process of law." *See* Pet. App. 47a-48a. Try as she might to stretch the allegations in her complaint, respondent does not and cannot assert that petitioners ever violated the criminal laws or contravened any independent legal duties in this case.

Second, the fact that some lower court decisions have upheld a particular legal claim does not create clearly established law *whenever* a plaintiff invokes such a claim, including in novel circumstances far removed from the previous decisions. This case arises in the very different (and highly sensitive) arena of foreign affairs and our government's posture towards quasi-military operations in other countries. Respondents' cases do not remotely present such a setting, which also counsels against judicial interference with executive authority. *See, e.g.*, *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). The fact that officials should clearly have known that they could not falsify evidence and obstruct justice in no way establishes that they should have been similarly certain that they could not deflect, even with deception, inquiries about sensitive matters of foreign policy. For this reason also, the decisions

cited by respondent must be viewed as having upheld constitutional claims on facts that are readily "distinguishable in a fair way from the facts presented in the case at hand." *Saucier v. Katz*, 121 S. Ct. 2151, 2157 (2001).

Third, as discussed at length in our opening brief, other lower court decisions cast considerable doubt on respondent's efforts to portray a persuasive consensus of authority here. *See, e.g.*, *Crowder*, 884 F.2d at 814 (rejecting right-of-access claim as a merely "facilitative right" that cannot be invoked where complainants "had 'access' to the Texas courts" at all times); *Foster v. City of Lake Jackson*, 28 F.3d 425, 430 n.7 (5th Cir. 1994) (framing the right in terms of an ability "to institute suit," and explicitly questioning "*Bell*'s reliance on *Ryland* for any broader definition of [the] right of access"); *Swekel*, 119 F.3d at 1264 (plaintiff must show "absolute denial from state court"); *Delew*, 143 F.3d at 1223 (defendants' conduct must render "*all* state court remedies ineffective") (emphasis added).

These other decisions show that the case law cannot be read to endorse respondent's sweeping due process claim. Indeed, one objectively reasonable observer – a federal district court – recently concluded that the ruling below was in square conflict on the merits of the right-of-access issue with the Fifth Circuit's controlling case law (let alone the Sixth and Ninth Circuits). *See Ellis v. Magee & Devereux*, 2001 WL 167744, at *2 & n.3 (E.D. La. Feb. 15, 2001) (D.C. Circuit ruling gives "the right of access to courts a broader definition than that recognized in this circuit"). Another objectively reasonable observer – the district court here – noted that the lower courts continue to disagree, even now, about the merits of the substantive due process issue. *See* Pet. App. 46a & n.2. Where, as here, there is no consensus about the proper *contours* and *application* of a particular claim, it plainly is *not yet* clearly established.

A clarion principle of the qualified immunity doctrine is that public officials "cannot be expected to predict the future course of constitutional law." *Procunier v. Navarette*, 434 U.S. 555,

562 (1978). "If judges thus disagree on a constitutional question, it is unfair to subject [public officials] to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999). Petitioners have discussed in detail various reasons why respondent's claims are not actionable here. That discussion surely shows that if the Court were to hold in this case that petitioners committed some sort of cognizable infraction, they at least did not violate constitutional rights that were clearly established at the time. To the contrary, "the constitutional question presented by this case is by no means open and shut," especially given the sensitive backdrop here trenching on concerns about foreign affairs and covert military operations around the globe. *Id.* at 615.[10]

CONCLUSION

For all of the reasons stated, the judgment below should be reversed, and the case remanded with instructions to dismiss the remaining *Bivens* claim brought against petitioners.

Respectfully submitted,

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[10] *Amici*'s reliance on the Court's refusal to find qualified immunity after granting certiorari in *Malley v. Briggs*, 475 U.S. 335 (1986), is unavailing. *See* BCJ Br. 30 & n.18. *Malley* concerned not whether a particular body of law was clearly established, but the highly specific question of whether a police officer's actions in applying for a warrant are *per se* objectively reasonable, provided the officer believes the facts alleged in his affidavit are true. *See* 475 U.S. at 345.

Supreme Court, U.S.
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No. 01-394

In the Supreme Court of the United States

WARREN CHRISTOPHER,
FORMER SECRETARY OF STATE, ET AL., PETITIONERS

v.

JENNIFER K. HARBURY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether allegations that senior State Department and National Security Council officials withheld information and intentionally misled a private citizen about their knowledge of a foreign rebel leader in the captivity of a foreign government state a violation of the constitutional right of access to the courts, when the only claim is that defendants' speech was intentionally misleading and there are no allegations that the plaintiff ever tried to file a lawsuit and was actually hindered in that effort.

2. Whether, if the Court concludes that a constitutional violation is properly grounded on allegations such as these, government officials violate clearly established law whenever they allegedly mislead a private citizen or conceal information and it is alleged that they intended to and did hinder the filing of a hypothetical lawsuit.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	5
Argument:	
Respondent has no constitutional right, let alone a clearly established right, to force candid disclosures of foreign affairs and intelligence information	7
A. The constitutional right of access to the courts does not prohibit the government from intentionally withholding information in response to informal requests	8
1. The intentional withholding of information in response to an informal citizen request does not violate the First Amendment	9
2. The intentional withholding of information in response to an informal citizen request does not violate the Due Process Clause	11
3. The court of appeals' rule would significantly chill and disrupt communications between citizens and government officials	21
B. Any arguable constitutional obligation to disclose foreign relations and intelligence information in response to an informal request for assistance was not clearly established	24
C. The existence of an alternative remedial scheme for obtaining information from the federal government precludes inference of a *Bivens* action	26
Conclusion	30

TABLE OF AUTHORITIES

Cases:	Page
Anderson v. *Creighton*, 483 U.S. 635 (1987)	24
Armstrong v. *Executive Office of the President*, 90 F.3d 553 (D.C. Cir. 1996), cert. denied, 520 U.S. 1239 (1997)	17
Bachmeier v. *Wallwork Truck Ctrs.*, 544 N.W.2d 122 (N.D. 1996)	16
Bell v. *City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984)	13, 14, 16
Bill Johnson's Rests., Inc. v. *NLRB*, 461 U.S. 731 (1983)	19
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)	1, 7, 29
Blake v. *McClung*, 172 U.S. 239 (1898)	8, 12
Block v. *Neal*, 460 U.S. 289 (1983)	19
Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975)	21
Boyd v. *Travelers Ins. Co.*, 652 N.E.2d 267 (Ill. 1995)	15
Brady v. *Maryland*, 373 U.S. 83 (1963)	12
Brown v. *Hamid*, 856 S.W.2d 51 (Mo. 1993)	16
Burns v. *Ohio*, 360 U.S. 252 (1959)	13
Bush v. *Lucas*, 462 U.S. 367 (1983)	26, 29
California Motor Transp. Co. v. *Trucking Unlimited*, 404 U.S. 508 (1972)	8, 23
Cedars-Sinai Med. Ctr. v. *Superior Court*, 954 P.2d 511 (Cal. 1998)	16
Chicago & S. Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948)	20, 29
Coates v. *Johnson & Johnson*, 756 F.2d 524 (7th Cir. 1985)	15
Coleman v. *Eddy Potash, Inc.*, 905 P.2d 185 (1995), overruled on other grounds, 34 P.3d 1148 (N.M. 2001)	15

Cases—Continued:	Page
College Sav. Bank v. *Florida Prepaid PostSecondary Educ. Expense Bd.*, 527 U.S. 666 (1999)	18
Corfield v. *Coryell*, 6 Fed. Cas. 546 (C.C. E.D. Pa. 1823) (No. 3230)	13
Correctional Servs. Corp. v. *Malesko*, 122 S. Ct. 515 (2001)	7, 26, 27, 29
County of Sacramento v. *Lewis*, 523 U.S. 833 (1998)	14, 18
Crawford-El v. *Britton*, 523 U.S. 574 (1998)	18, 23
Crowder v. *Sinyard*, 884 F.2d 804 (5th Cir. 1989), cert. denied, 496 U.S. 924 (1990)	18
DeLaughter v. *Lawrence County Hosp.*, 601 So.2d 818 (Miss. 1992)	16
Department of the Navy v. *Egan*, 484 U.S. 518 (1988)	20
Department of the Air Force v. *Rose*, 425 U.S. 352 (1976)	27
Eastern R.R. Presidents Conf. v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)	10
Edelman v. *Federal Hous. Admin.*, 382 F.2d 594 (2d Cir. 1967)	19
Fada Indus., Inc. v. *Falchi Bldg. Co.*, 730 N.Y.S.2d 827 (Sup. Ct. 2001)	15
Federated Mut. Ins. Co. v. *Litchfield Precision Components, Inc.*, 456 N.W.2d 434 (Minn. 1990)	15
Foster v. *City of Lake Jackson*, 28 F.3d 425 (5th Cir. 1994)	15, 25
Foster v. *Lawrence Mem'l Hosp.*, 809 F. Supp. 831 (D. Kan. 1992)	15
Goff v. *Harold Ives Trucking Co.*, 27 S.W.3d 387 (Ark. 2000)	16
Guillory v. *Dillard's Dep't Store, Inc.*, 777 So.2d 1 (La. Ct. App. 2000)	15
Halperin v. *Kissinger*, 807 F.2d 180 (D.C. Cir. 1986)	23
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982)	7
Hatahley v. *United States*, 351 U.S. 173 (1956)	19
Hay v. *Peterson*, 45 P. 1073 (Wyo. 1896)	16

Cases—Continued: Page

Henderson v. *Tyrrell*, 910 P.2d 522 (Wash. Ct. App. 1996) 16
Henry v. *Deen*, 310 S.E.2d 326 (N.C. 1984) 15
Hibbits v. *Sides*, 34 P.3d 327 (Alaska 2001) 15
Holmes v. *Amerex Rent-A-Car*, 710 A.2d 846 (D.C. 1998) 15
Houchins v. *KQED, Inc.*, 438 U.S. 1 (1978) 5, 6, 10, 11, 17
Hudson v. *Palmer*, 468 U.S. 517 (1984) 21
Hull, Ex parte, 312 U.S. 546 (1941) 13
Hunter v. *Bryant*, 502 U.S. 224 (1991) 7, 23
Hutchins v. *Utica Mut. Ins. Co.*, 484 N.Y.S.2d 686 (App. Div. 1985) 15
Illinois v. *Perkins*, 496 U.S. 292 (1990) 22
Jenkins v. *Talladega City Bd. of Educ.*, 115 F.3d 821 (11th Cir.), cert. denied, 522 U.S. 966 (1997) 25
John Doe Agency v. *John Doe Corp.*, 493 U.S. 146 (1989) 28
Johnson v. *Avery*, 393 U.S. 483 (1969) 13
Kippenhan v. *Chaulk Servs., Inc.*, 697 N.E.2d 527 (Mass. 1998) 16
Kyles v. *Whitley*, 514 U.S. 419 (1995) 12
La Raia v. *Superior Court*, 722 P.2d 286 (Ariz. 1986) 15
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) 19
Lauren Corp. v. *Century Geophysical Corp.*, 953 P.2d 200 (Colo. Ct. App. 1998) 16
Lewis v. *Casey*, 518 U.S. 343 (1996) 11, 12, 18
Malley v. *Briggs*, 475 U.S. 335 (1986) 24
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 29
Metz v. *United States*, 788 F.2d 1528 (11th Cir.), cert. denied, 479 U.S. 930 (1986) 19
Meyn v. *State*, 594 N.W.2d 31 (Iowa 1999) 16
Miller v. *Allstate Ins. Co.*, 573 So. 2d 24 (Dist. Ct. App. 1990), review denied, 581 So.2d 1307 (Fla. 1991) ... 15

Cases—Continued: Page

Miller v. *Montgomery County*, 494 A.2d 761 (Ct. Spec. App.), cert. denied, 498 A.2d 1185 (Md. 1985) 16
Minnesota State Bd. for Comm. Colls. v. *Knight*, 465 U.S. 271 (1984) 10
Monsanto Co. v. *Reed*, 950 S.W.2d 811 (Ky. 1997) 16
Murray v. *Giarratano*, 492 U.S. 1 (1989) 8
Oliver v. *Stimson Lumber Co.*, 993 P.2d 11 (Mont. 1999) 15
Paul v. *Davis*, 424 U.S. 693 (1976) 18
Pell v. *Procunier*, 417 U.S. 817 (1974) 11
Pennsylvania v. *Finley*, 481 U.S. 551 (1987) 8
Public Citizen v. *United States Dep't of Justice*, 491 U.S. 440 (1989) 28
Rosenblit v. *Zimmerman*, 766 A.2d 749 (N.J. 2001) 15
Ryland v. *Shapiro*, 708 F.2d 967 (5th Cir. 1983) 14
Saucier v. *Katz*, 121 S. Ct. 2151 (2001) 7
Schroeder v. *Commonwealth*, 710 A.2d 23 (Pa. 1998) 16
Schweiker v. *Chilicky*, 487 U.S. 412 (1988) 26, 27, 29
Seattle Times Co. v. *Rhinehart*, 467 U.S. 20 (1984) 11
Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872) 13
Smith v. *Bennett*, 365 U.S. 708 (1961) 13
Smith v. *Howard Johnson Co.*, 615 N.E.2d 1037 (Ohio 1993) 15
Souza v. *Fred Carries Contracts, Inc.*, 955 P.2d 3 (Ariz. Ct. App. 1997) 16
Stender v. *Vincent*, 992 P.2d 50 (Haw. 2000) 16
Sullivan v. *CIA*, 992 F.2d 1249 (1st Cir. 1993) 28
Swekel v. *City of River Rouge*, 119 F.3d 1259 (6th Cir. 1997), cert. denied, 522 U.S. 1047 (1998) 15, 20
Talbert v. *United States*, 932 F.2d 1064 (4th Cir. 1991) 19
Thomas-Lazear v. *FBI*, 851 F.2d 1202 (9th Cir. Cir. 1988) 19
Thompson v. *Owensby*, 704 N.E.2d 134 (Ct. App. 1998), transfer denied, 726 N.E.2d 304 (Ind. 1999) 15

Cases—Continued: Page

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Trevino v. *Ortega*, 969 S.W.2d 950 (Tex. 1998) 16
United States v. *Stanley*, 483 U.S. 669 (1987) 30
United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) 29
U.S. Info. Agency v. *Krc*, 989 F.2d 1211 (D.C. Cir. 1993), cert. denied, 510 U.S. 1109 (1994) 19
Vasquez v. *Hernandez*, 60 F.3d 325 (7th Cir. 1995), cert. denied, 517 U.S. 1156 (1996) 20
Virginia Bankshares, Inc. v. *Sandberg*, 501 U.S. 1083 (1991) 21
Wal-Mart Stores, Inc. v. *Goodman*, 789 So.2d 166 (Ala. 2000) 15
Walters v. *National Assn of Radiation Survivors*, 473 U.S. 305 (1985) 8
Weigl v. *Quincy Specialties Co.*, 601 N.Y.S.2d 774 (Sup. Ct. 1993) 15
Williamson County Reg'l Planning Comm'n v. *Hamilton Bank*, 473 U.S. 172 (1985) 20
Wilson v. *Layne*, 526 U.S. 603 (1999) 25
Wolff v. *McDonnell*, 418 U.S. 539 (1974) 12

Constitution, statutes and rules:

U.S. Const.:
Art. IV, § 2, Cl. 1 (Privileges and Immunities Clause) 8, 12
Amend. I 3, 5, 8, 10, 11, 26
Petition Clause 5, 8, 9, 10
Amend. V 3, 5, 8, 20
Due Process Clause 5, 8, 11, 12, 18
Just Compensation Clause 20
Amend. XIV (Equal Protection Clause) 8
Central Intelligence Agency Information Act, 50 U.S.C. 431 28
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 111 26

Statutes and rules—Contined: Page

Federal Advisory Committee Act, 5 U.S.C. App. at 1 27
§ 10 28
§ 10(b) 28
§ 10(d) 28
Federal Tort Claims Act:
28 U.S.C. 1346(b)(1) (Supp. V 1999) 19
28 U.S.C. 2680(h) 19
28 U.S.C. 2680(k) 19
Freedom of Information Act:
5 U.S.C. 552 16
5 U.S.C. 552(a)(4)(B) (1994 & Supp. V 1999) 27
5 U.S.C. 552(a)(4)(E) 27
5 U.S.C. 552(a)(6)(A) (1994 & Supp. V 1999) 27
5 U.S.C. 552(a)(6)(E) (1994 & Supp. V 1999) 27
5 U.S.C. 552(b)(1) 17, 28
5 U.S.C. 552(b)(3) 28
5 U.S.C. 552(b)(7) 28
5 U.S.C. 552(c) 24
Government in the Sushine Act:
5 U.S.C. 552b 27
5 U.S.C. 552b(b) 28
5 U.S.C. 552b(c)(1) 28
5 U.S.C. 552b(c)(3) 28
5 U.S.C. 552b(c)(7) 28
5 U.S.C. 552b(f)(2) 28
5 U.S.C. 552b(h) 28
5 U.S.C. 552b(i) 28
Privacy Act of 1974:
5 U.S.C. 552a 27
5 U.S.C. 552a(d) 28
5 U.S.C. 552a(g) 28
5 U.S.C. 552a(k)(1) 28
5 U.S.C. 552a(k)(2) 28
5 U.S.C. 552a(k)(3) 28
Westfall Act, 28 U.S.C. 2679(d) 15
5 U.S.C. 702 19

Statutes and rules—Contined:	Page
18 U.S.C. 1001 (1994 & Supp. V 1999)	14
18 U.S.C. 1510 (1994 & Supp. V 1999)	14
18 U.S.C. 1511	14
18 U.S.C. 1512 (1994 & Supp. V 1999)	14
18 U.S.C. 1621-1623	14
1 W. & M., 2d Sess., ch. 2, § 5	10
Fed. R. Civ. P.:	
Rule 12(e)	3
Rule 37	16
Rule 60(b)	16
Miscellaneous:	
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House Perm Select Comm. on Intelligence, 105th Cong., 1st Sess., *Report on the Guatemala Review* (Mar. 19, 1997)	3
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S. Nolte, *The Spoliation Tort: An Approach to Underlying Principles*, 26 St. Mary's L.J. 351 (1995)	15
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In the Supreme Court of the United States

No. 01-394

WARREN CHRISTOPHER,
FORMER SECRETARY OF STATE, ET AL., PETITIONERS

v.

JENNIFER K. HARBURY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns a claim for damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against high-level federal officials, based on their alleged failure to disclose and intentional concealment of intelligence and foreign relations information informally requested by a private citizen. The United States has a significant interest in this matter because the ruling below exposes government officials to a claim for personal monetary liability if they are deemed to be less than fully forthcoming in responding to a request for assistance from a member of the public. The United States also has a substantial interest in protecting government employees from litigation that may interfere with their exercise of lawful discretion in the performance of their official functions,

especially when handling sensitive intelligence and foreign relations information.

STATEMENT

1. Respondent, an American citizen, alleges that she was the wife of Efrain Bamaca-Velasquez, a Guatemalan national and a leader of the rebel Guatemalan National Revolutionary Union. Pet. App. 2a. Respondent asserts that Bamaca was captured, tortured, and later executed by members of the Guatemalan military, including individuals who were allegedly paid "CIA 'assets.'" *Id.* at 3a. Respondent claims that, in 1993, upon learning that Bamaca was alive and being tortured, she contacted several State Department officials and asked for information about Bamaca's status. Although the officials allegedly agreed to look into the matter, they never provided her with specific information. *Id.* at 3a-4a.

In October 1994, in response to a press report, the State Department publicly confirmed Bamaca's capture by government forces, but also reported that it had no information confirming that Bamaca was still alive. Pet. App. 4a. "[S]uspect[ing] that information was still being improperly withheld from her," J.A. 34, respondent filed Freedom of Information Act requests with the State Department, the CIA, the National Security Council, and other federal agencies in January 1995. Although the requests were expedited, she alleges that she received no documents "in the following months." Pet. App. 4a; J.A. 35. Three months later, State Department and National Security Council officials told respondent "they believed Bamaca was dead because so many years had passed without evidence that he was alive." Pet. App. 4a. Shortly thereafter, then-Congressman Torricelli asserted publicly that Bamaca had been killed

years earlier at the order of a Guatemalan army colonel who allegedly had been a paid CIA informant. *Id.* at 4a-5a.[1]

2. Respondent filed suit against various named and unnamed officials of the CIA, the State Department, and the National Security Council, seeking compensatory and punitive damages. Among her 28 causes of action, she alleged that the officials' failure to provide her with all the information in their possession, or accessible to them, violated her "Right to Meaningful Access to the Courts" under the First and Fifth Amendments. Pet. App. 7a; J.A. 49. Specifically, respondent asserted that, while Bamaca was still alive, State Department officials made "fraudulent statements and intentional omissions" about his exact whereabouts and status that prevented her from "effectively seeking adequate legal redress," J.A. 37, and that they did so because "they did not want to threaten their ability to obtain information from Mr. Bamaca," and feared "public embarrassment, censure, and/or legal liability," J.A. 31-32.

3. After ordering respondent to "put forward specific, nonconclusory factual allegations" in support of her claims, Fed. R. Civ. P. 12(e) (D. Ct. 7/20/98 Order at 1), and reviewing her submission, the district court dismissed all eight of respondent's *Bivens* counts. Pet. App. 30a-59a. The court rejected respondent's access-to-the-courts claim because she never "attempted to gain access to state-court remedies before bringing a constitutional denial of access claim," *id.* at 45a, and so her "suspicion that the alleged cover-up may

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[1] The House Intelligence Committee subsequently released a report criticizing Representative Torricelli's public release of classified information and finding "no evidence to support [his] allegations that United States Government personnel in any way directed or participated in the * * * interrogation and subsequent disappearance of Bamaca." House Perm. Select Comm. on Intelligence, 105th Cong., 1st Sess., *Report on the Guatemala Review* 3, 6 (Mar. 19, 1997); *id.* at 3 ("none of the allegations raised by Representative Torricelli * * * have proven to be true").

have prejudiced her rights to bring a separate action is nothing more than a guess," *id.* at 46a. The district court further noted that respondent "never addresse[d]" what form such a lawsuit would have taken or whether it could have been maintained. *Id.* at 47a n.4. "A cover-up to conceal evidence," the district court explained, "cannot prejudice a plaintiff's access to courts if the cause of action contemplated is untenable from the outset." *Ibid.* The court also ruled that, even if respondent's constitutional rights had been infringed, those rights were not clearly established.

4. The court of appeals reversed only the dismissal of respondent's access-to-the-courts claim. Pet. App. 1a-29a. The court acknowledged that respondent "never alleges that defendants breached a duty to disclose information to her," *id.* at 23a, but it held that petitioners' conduct nevertheless "effectively prevented her from seeking emergency injunctive relief in time to save her husband's life," *id.* at 25a, "based on an underlying tort claim for intentional infliction of emotional distress," *id.* at 24a. The court of appeals denied qualified immunity because it would "have been clear to an objectively reasonable official that affirmatively misleading [respondent] for the purpose of preventing her from filing a lawsuit would violate her constitutional rights." *Id.* at 28a.

In response to a petition for rehearing, the panel issued a supplemental opinion, Pet. App. 61a-68a, limiting its decision to situations where "defendants both affirmatively mislead plaintiffs *and* do so for the very purpose of protecting government officials from suit," *id.* at 62a. With respect to the argument that respondent had failed to "point to a colorable claim that has been prejudiced by the alleged cover-up," *id.* at 63a, the panel found it sufficient that the complaint alleged that the cover-up had "foreclosed [her] from effectively seeking adequate legal redress."

5. The court of appeals denied the petitioners' request for rehearing en banc. Pet App. 69a-70a. Judges Henderson and Sentelle dissented, *id.* at 70a-71a, on the ground that respondent "has nowhere identified what 'legal redress' might have been adequate to save her husband" from "Guatemalan nationals [operating] on Guatemalan soil" against "another Guatemalan national," *id.* at 70a. In the dissent's view, "[t]he only cause" of her inability to obtain relief "is the absence of any effective relief," *ibid.*, and, in any event, case precedent did not clearly establish any constitutional violation, *id.* at 71a.

SUMMARY OF ARGUMENT

Respondent's complaint that, despite offers to help, high-ranking national security officials failed to disclose to her all of the sensitive information available to them about the status of her alleged husband, a Guatemalan guerrilla leader, does not state a constitutional violation, let alone a clearly established one. The right of access to the courts does not include a right to force government officials to disclose all information available to them, even when that information might preserve litigation options. Respondent purports to base her constitutional case on the First and Fifth Amendments. But while the First Amendment's Petition Clause forbids direct governmental obstruction of, or retaliation for, the presentation of grievances, this Court's cases make clear that the First Amendment does not impose any affirmative duty on the government to respond to such petitions or to provide the grist for litigation. See, *e.g.*, *Houchins* v. *KQED, Inc.*, 438 U.S. 1 (1978). The Due Process Clause likewise operates as a negative prohibition on the imposition of direct impediments to the pursuit of viable court actions. It does not saddle government officials with the affirmative duty to disclose information whenever a citizen requests it, nor, in the absence of a lawsuit, must officials facilitate the discovery of potential claims against the government. "The Constitution itself is n[ot] a Freedom of Information Act." *Id.* at 14.

Nor can respondent demonstrate that the alleged withholding of information impaired any legally viable cause of action or caused her any injury. Had it been filed, her hypothesized injunctive suit for the intentional infliction of emotional distress would have faced formidable sovereign immunity and justiciability hurdles. Respondent, however, never filed such a suit, even though a due process violation requires a concrete effort to avail oneself of existing legal remedies. Nor did respondent file a timely FOIA request. There are ample existing political, statutory, criminal law, and state tort law mechanisms for obtaining information from the government and for redressing the willful suppression, destruction, or falsification of evidence. But respondent chose not to invoke those remedies, and there is no sound justification for creating a new constitutional tort to replicate the relief they offer.

Nor do public policy considerations commend such a course. Recognition of a broad constitutional right to full disclosure in response to informal queries would stifle government-to-citizen communications and launch the courts on a prolonged course of identifying and delimiting the exceptions to and limitations on that disclosure obligation. Such delicate balancing exercises are better left to the political branches.

Even were the Court to recognize a constitutional duty of full disclosure, qualified immunity would remain appropriate because no such constitutional right was clearly established at the time petitioners acted. Moreover, even if such a constitutional right is recognized, there is no reason to infer a *Bivens* action to remedy its violation. Congress already has provided a network of interlocking statutory mechanisms for obtaining information and documents from federal agencies. Together, the Freedom of Information Act and related open government laws establish a comprehensive remedial framework that protects both the public interest in obtaining information about governmental policies and programs, and the government's need for confidentiality to protect the national security. In light of the calibrated remedial balance reflected in those statutes, there is no reason to superimpose a *Bivens* action. See *Correctional Servs. Corp.* v. *Malesko*, 122 S. Ct. 515 (2001).

ARGUMENT

RESPONDENT HAS NO CONSTITUTIONAL RIGHT, LET ALONE A CLEARLY ESTABLISHED RIGHT, TO FORCE CANDID DISCLOSURES OF FOREIGN AFFAIRS AND INTELLIGENCE INFORMATION

In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court recognized an implied private cause of action for damages against federal officers in their personal capacities, where they are alleged to have violated constitutional rights under color of their federal authority. Officials sued under *Bivens*, however, enjoy qualified immunity unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982).

In evaluating a qualified immunity defense, a court must undertake two distinct inquiries. *Saucier* v. *Katz*, 121 S. Ct. 2151, 2155 (2001). The court first must decide whether the facts as alleged state a violation of a constitutional right. If they do, the court next must decide whether that right was clearly established "under settled law," *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991) (per curiam), such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *Saucier*, 121 S. Ct. at 2156. Respondent's claimed denial of access to the courts fails on both fronts.

A. The Constitutional Right Of Access To The Courts Does Not Prohibit The Government From Intentionally Withholding Information In Response To Informal Requests

Although the Constitution's text does not expressly provide a right of "access to the courts," decisions of this Court have grounded it in the First Amendment's Petition Clause, see, *e.g.*, *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972), the Fifth Amendment's Due Process Clause, see, *e.g.*, *Murray* v. *Giarratano*, 492 U.S. 1, 11 n.6 (1989) (plurality opinion); *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 335 (1985), the Equal Protection Clause, see, *e.g.*, *Pennsylvania* v. *Finley*, 481 U.S. 551, 557 (1987), and the Privileges and Immunities Clause, U.S. Const., art. 4, § 2, Cl. 1, see, *e.g.*, *Blake* v. *McClung*, 172 U.S. 239, 249 (1898). Whatever its textual source—respondent relies on the First and Fifth Amendments (J.A. 49)—this Court's decisions make clear that it operates as a negative prohibition on governmental conduct that prevents an individual from presenting independently identified grievances to a court of law. It does not impose any affirmative duty of candor on the government or require it to provide information in response to informal requests.

The central factual allegations composing respondent's access-to-the-court claims are that, *before* Bamaca's death, several State Department officials, including the Ambassador to Guatemala, "promised to look into the matter and to assist her," but did not (J.A. 29, 30-31), even though evidence concerning Bamaca's fate allegedly was "readily available and accessible to" them (J.A. 30).[2] Thus, the crux

[2] The court of appeals viewed respondent's alleged inability to seek emergency injunctive relief as critical to her constitutional claim. Had petitioners' actions not allegedly prevented respondent from seeking emergency injunctive relief, the court of appeals indicated that it "might agree with the district court" order dismissing the case. Pet. App. 24a.

of respondent's complaint is not that government officials interposed hurdles that prevented her from filing a case in court or obstructed pending proceedings. It is that government officials "affirmatively deceived her" (Pet. App. 23a) by deliberately withholding and denying knowledge of information that, if disclosed, would have allowed her quickly to formulate a cause of action against the government for "emergency injunctive relief in time to save her husband's life" (*id.* at 25a). The claim is thus more accurately described, not as denying her access to the courts, but as denying her timely access to information that in some unexplained fashion might have inspired her to file some form of lawsuit that might, in turn, in some unexplained way, have prevented Bamaca's execution by Guatemalan soldiers. No such amorphous and illusory right exists in the Constitution.

1. The Intentional Withholding of Information in Response to an Informal Citizen Request Does Not Violate the First Amendment

Both history and precedent establish that the First Amendment right to petition the government for redress of grievances is a purely negative protection against governmental obstruction; it does not impose any affirmative obligations on the government to respond or police the content of its response. The First Amendment's Petition Clause traces its roots to the English Bill of Rights of 1689, which created the right as an entitlement to air grievances and a protection against retaliation for doing so. The Bill of Rights declared that "it is the right of the subjects to petition the King, and all committments and prosecutions for such peti-

Thus, although the complaint contains allegations concerning statements made by petitioners "After Her Husband's Extrajudicial Execution" (J.A. 32), those statements could not have impeded her ability to seek emergency relief that could have saved Bamaca's life. In any event, those statements do not differ substantively from those preceding Bamaca's death and thus do not alter the legal analysis.

tioning are illegal." 1 W. & M., 2d Sess., ch. 2, § 5 (Eng.). The Continental Congress likewise couched the right largely in terms of a protection against retaliation: "That they have a right peaceably to assemble, consider of their grievances, and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal." 5 *The Founders' Constitution* 199 (P. Kurland & R. Lerner eds., 1987). The text of the First Amendment reflects those historical roots by protecting "the right to petition the Government for a redress of grievances." U.S. Const. Amend. I. That protection is fundamental because "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight Inc.*, 365 U.S. 127, 137 (1961).

Although the Constitution thus guarantees the right to voice grievances, this Court's cases interpreting the Petition Clause consistently have eschewed employing it to regulate the government's response to petitions or creating a right of access to information. In *Minnesota State Board for Community Colleges* v. *Knight*, 465 U.S. 271 (1984), the Court stressed that, while the First Amendment empowers individuals to "petition openly" and protects them "from retaliation for doing so," the Petition Clause "does not impose any affirmative obligation on the government to listen [or] to respond." *Id.* at 286 (internal quotation marks omitted).

Indeed, this Court has recognized that "[t]here is no discernible basis" in the First Amendment "for a constitutional duty to disclose, or for standards governing disclosure of or access to information." *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 14 (1978). Nor is there a "constitutional right to have access to particular government information, or to require openness from the bureaucracy." *Ibid.* (internal quotation marks omitted). "The Constitution itself is n[ot] a Freedom of In-

formation Act." *Ibid.* While respondent undoubtedly had a First Amendment right to bring her concerns, whatever they might be, to the attention of government officials, "[i]t is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to [respondent] sources of information" about foreign relations and foreign intelligence operations "not available to members of the public generally." *Pell* v. *Procunier*, 417 U.S. 817, 834-835 (1974). "That proposition finds no support in the words of the Constitution or in any decision of this Court." *Ibid.*

That respondent allegedly desired the information to facilitate the prosecution of some form of lawsuit does not alter the analysis. The laws governing discovery of information needed for litigation "are a matter of legislative grace," not constitutional compulsion. *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 32 (1984). A "litigant has no First Amendment right of access to information made available only for purposes of trying his suit." *Ibid.* By the same token, respondent cannot wring out of the First Amendment a right to extra-judicial, pre-litigation discovery from the government of information relevant to formulating a cause of action against the government.

2. The Intentional Withholding of Information in Response to an Informal Citizen Request Does Not Violate the Due Process Clause

a. Respondent's arguments fare no better under the Due Process Clause. In *Lewis* v. *Casey*, 518 U.S. 343 (1996), this Court addressed the due process right of access to the courts and expressly "disclaim[ed]" any "suggest[ion] that the State must enable [individuals] to *discover* grievances." *Id.* at 354. Rather than obliging the government to provide information and materials that would allow individuals "to transform themselves into litigating engines," *id.* at 355, the right of access to the courts only empowers an individual "to bring to

court a grievance that the [individual] wishe[s] to present," *id.* at 354.

Likewise, *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), stressed that the right of access to the courts founded in the Due Process Clause simply "assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Id.* at 579. Thus the right of access to the courts "has not been extended by this Court to apply further than protecting the ability of an inmate to prepare a petition or complaint." *Id.* at 576. Nothing in the Court's opinion in *Wolff* suggested that the government must also provide—or refrain from withholding—the grist for the complaint. Once litigation is commenced, certain statutes and the Federal Rules may obligate the government to comply with discovery requests, but prior to the initiation of a lawsuit, the government is under no obligation to respond to informal requests for information in a way that preserves the individual's unarticulated litigation options. And the constitutional analysis does not change just because a government official promises to look into a matter and get back in touch.[3]

Casey's and *Wolff*'s recognition that the right of access imposes no affirmative duty on government to facilitate the identification of causes of action is consistent with the historical genesis of that right in the Privileges and Immunities Clause. See, *e.g.*, *Blake* v. *McClung*, 172 U.S. 239, 249 (1898) (Privileges and Immunities include the right "to institute

[3] The Due Process Clause does impose a specialized and limited duty of disclosure in the context of criminal prosecutions. See *Brady* v. *Maryland*, 373 U.S. 83 (1963). The far-reaching duty of disclosure that respondent seeks to impose broadly on all governmental actors far exceeds anything that criminal defendants are entitled to under *Brady*. Cf. *Kyles* v. *Whitley*, 514 U.S. 419, 436-437 (1995) ("[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense.").

and maintain actions of any kind in the courts of the state").[4] Many of the earliest due process and equal protection cases likewise focused on governmentally imposed structural impediments to the presentation of a complaint to a court of law. See, *e.g.*, *Ex parte Hull*, 312 U.S. 546, 549 (1941) (State may not condition the right to apply to a federal court for a writ of habeas corpus on approval by the warden).[5]

The Court's analysis in *Casey* and *Wolff* applies with greater force here. Those cases arose in the prison context, where the government literally interposes significant physical and informational barriers between the inmate and the courts. The rights of a free citizen, who suffers from no commensurate restrictions, to governmental assistance in identifying potential causes of action cannot be greater than the prisoners who do face those obstacles.

b. In finding that respondent had properly alleged a denial of access to the courts, the court of appeals relied primarily not on decisions of this Court, but on lower court decisions holding that law enforcement officials may infringe the right of access to courts when they cover-up their own or their co-workers' wrongdoing. For example, in *Bell* v. *City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), police officers attempted to cover-up an improper shooting by planting a knife on the victim and lying to the victim's relatives,

[4] See also *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1872) ("right of free access to * * * courts of justice in the several States"); *Corfield* v. *Coryell*, 6 Fed. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, Circuit Justice) (right to "institute and maintain actions of any kind in the courts of the state").

[5] See also *Johnson* v. *Avery*, 393 U.S. 483, 487 (1969) (active interference with preparation of legal documents that "effectively" forbids "prisoners to file habeas corpus petitions"); *Smith* v. *Bennett*, 365 U.S. 708, 713-714 (1961) (waiver of filing fee for habeas corpus petitions based on indigency); *Burns* v. *Ohio*, 360 U.S. 252, 258 (1959) (same, with respect to docket fees, because the rule "completely bar[s] the petitioner from obtaining any review at all").

causing them to accept a *de minimis* settlement from the city. *Id.* at 1261-1262. In *Ryland* v. *Shapiro*, 708 F.2d 967 (5th Cir. 1983), a coroner and a district attorney covered up a murder committed by a fellow prosecutor by falsifying records to reflect that the victim had committed suicide. *Id.* at 969-975.

The willful destruction and falsification of evidence in *Bell* and *Ryland* were, of course, inexcusable and unlawful on many fronts. But the conduct at issue here—an alleged lack of forthrightness in voluntarily responding to a private citizen's informal requests for information—hardly constitutes that sort of "cover-up."

More fundamentally, not every wrongful action of a government official is unconstitutional. *County of Sacramento* v. *Lewis*, 523 U.S. 833, 845 n.7 (1998) (the common law "made many things unlawful, very few of which were elevated to constitutional proscriptions"). The traditional understanding and operation of the right of access to the courts as a right to institute and maintain legal actions bears little logical connection to those isolated instances of unlawful, extra-judicial misconduct designed to deny justice in a particular situation. Moreover, there is no need to contort constitutional doctrine to redress, through a new constitutional tort, conduct that already is criminally and civilly actionable. The criminal law punishes and deters precisely such behavior.[6] Tort law also provides remedies. In addition to tort actions for the officers' underlying conduct (such as wrongful death), independent tort suits for the spoliation of

[6] See, *e.g.*, 18 U.S.C. 1001 (1994 & Supp. V 1999) (falsification of records); 18 U.S.C. 1510 (1994 & Supp. V 1999) (obstruction of federal criminal investigations); 18 U.S.C. 1511 (obstruction of state and local law enforcement); 18 U.S.C. 1512 (1994 & Supp. V 1999) (witness tampering); 18 U.S.C. 1621-1623 (perjury, subornation of perjury, and false declarations).

evidence, fraudulent concealment, or impairment of the right to sue may also be available.[7]

Once an individual commences litigation, ordinary discovery processes and sanctions provide adequate means of obtaining information relevant to the litigation and policing cover-ups or failures to disclose. Where evidence is lost or prejudiced due to the passage of time or the destruction of documents, courts can resolve such matters in favor of the plaintiff under local rules of evidence and procedure.[8] Where

[7] See, *e.g.*, *Swekel* v. *City of River Rouge*, 119 F.3d 1259, 1264 (6th Cir. 1997), cert. denied, 522 U.S. 1047 (1998); *Hibbits* v. *Sides*, 34 P.3d 327 (Alaska 2001); *Rosenblit* v. *Zimmerman*, 766 A.2d 749, 757-758 (N.J. 2001); *Fada Indus., Inc.* v. *Falchi Bldg. Co.*, 730 N.Y.S.2d 827, 831 (Sup. Ct. 2001); *Wal-Mart Stores, Inc.* v. *Goodman*, 789 So.2d 166, 176 (Ala. 2000); *Guillory* v. *Dillard's Dep't Store, Inc.*, 777 So.2d 1 (La. Ct. App. 2000); *Oliver* v. *Stimson Lumber Co.*, 993 P.2d 11 (Mont. 1999); *Holmes* v. *Amerex Rent-A-Car*, 710 A.2d 846 (D.C. 1998); *Thompson* v. *Owensby*, 704 N.E.2d 134 (Ct. App. 1998), transfer denied, 726 N.E.2d 304 (Ind. 1999); *Boyd* v. *Travelers Ins. Co.*, 652 N.E.2d 267 (Ill. 1995); *Coleman* v. *Eddy Potash, Inc.*, 905 P.2d 185 (1995), overruled on other grounds, 34 P.3d 1148 (N.M. 2001); *Smith* v. *Howard Johnson Co.*, 615 N.E.2d 1037 (Ohio 1993); *Weigl* v. *Quincy Specialties Co.*, 601 N.Y.S.2d 774 (Sup. Ct. 1993); *Foster* v. *Lawrence Mem'l Hosp.*, 809 F. Supp. 831, 838-839 (D. Kan. 1992); *Federated Mut. Ins. Co.* v. *Litchfield Precision Components, Inc.*, 456 N.W.2d 434 (Minn. 1990); *Miller* v. *Allstate Ins. Co.*, 573 So.2d 24 (Dist. Ct. App. 1990), review denied, 581 So.2d 1307 (Fla. 1991); *La Raia* v. *Superior Court*, 722 P.2d 286 (Ariz. 1986); *Hutchins* v. *Utica Mut. Ins. Co.*, 484 N.Y.S.2d 686 (App. Div. 1985); see also *Henry* v. *Deen*, 310 S.E.2d 326 (N.C. 1984) (recognizing "civil conspiracy" to destroy records and create false records); see generally S. Nolte, *The Spoliation Tort: An Approach to Underlying Principles*, 26 St. Mary's L.J. 351 (1995). Restrictions on the assertion of tort claims against the government, see, *e.g.*, Westfall Act, 28 U.S.C. 2679(d), might limit the ability of a litigant to recover on such tort claims. That, however, is a function of long-established principles of sovereign immunity, rather than a denial of access to the courts.

[8] See, *e.g.*, *Foster* v. *City of Lake Jackson*, 28 F.3d 425, 431 n.9 (5th Cir. 1994); *Coates* v. *Johnson & Johnson*, 756 F.2d 524, 551 (7th Cir. 1985) ("bad faith destruction of a document relevant to proof of an issue at trial

fraud is discovered after the litigation concludes, the case may be reopened. See, *e.g.*, Fed. R. Civ. P. 60(b).[9]

The government's obligation under the Federal Rules of Civil Procedure to respond to discovery requests once litigation commences is quite different from a perpetual, generalized constitutional duty to provide information before litigation begins at the behest of any public requestor. If a member of the public wishes to impose a legally enforceable duty of disclosure on the government, Congress has provided a formal mechanism for doing so in the Freedom of Information Act, 5 U.S.C. 552. To be sure, in responding to a FOIA request, the government may invoke several well-

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gives rise to a strong inference that production of the document would have been unfavorable to the party responsible for its destruction"); *Goff* v. *Harold Ives Trucking Co.*, 27 S.W.3d 387, 391 (Ark. 2000); *Stender* v. *Vincent*, 992 P.2d 50, 57 (Haw. 2000); *Meyn* v. *State*, 594 N.W.2d 31, 34 (Iowa 1999); *Cedars-Sinai Med. Ctr.* v. *Superior Court*, 954 P.2d 511, 521 & n.4 (Cal. 1998); *Kippenhan* v. *Chaulk Servs., Inc.*, 697 N.E.2d 527 (Mass. 1998); *Schroeder* v. *Commonwealth*, 710 A.2d 23, 26-27 & n.5 (Pa. 1998); *Trevino* v. *Ortega*, 969 S.W.2d 950, 952 (Tex. 1998); *Lauren Corp.* v. *Century Geophysical Corp.*, 953 P.2d 200, 204 (Colo. Ct. App. 1998); *Monsanto Co.* v. *Reed*, 950 S.W.2d 811, 815 (Ky. 1997); *Souza* v. *Fred Carries Contracts, Inc.*, 955 P.2d 3 (Ariz. Ct. App. 1997); *Bachmeier* v. *Wallwork Truck Ctrs.*, 544 N.W.2d 122, 126 (N.D. 1996); *Henderson* v. *Tyrrell*, 910 P.2d 522, 531-532 (Wash. Ct. App. 1996); *Brown* v. *Hamid*, 856 S.W.2d 51, 57 (Mo. 1993); *DeLaughter* v. *Lawrence County Hosp.*, 601 So.2d 818, 821-822 (Miss. 1992); *Miller* v. *Montgomery County*, 494 A.2d 761, 768 (Ct. Spec. App.), cert. denied, 498 A.2d 1185 (Md. 1985); *Hay* v. *Peterson*, 45 P. 1073, 1076 (Wyo. 1896); see generally Fed. R. Civ. P. 37 (sanctions for failure to comply with discovery). Where the misconduct delays discovery of the injury, equitable estoppel may be available. See, *e.g.*, *Bell*, 746 F.2d at 1255 ("the defendants' concealment of the truth precludes the application of *res judicata* and the statute of limitations").

[9] The Constitution also establishes political checks on the responsiveness of government officials. Respondent's allegations have been the subject of both congressional and media scrutiny, and citizens retain the power to vote out of office government officials deemed to be insufficiently forthright or cooperative.

defined exemptions, including one for national security. 5 U.S.C. 552(b)(1). But the existence of those statutory exemptions simply underscores the folly of creating a constitutional right to litigation-enabling information through informal requests. In administering such a constitutional right to government information, "hundreds of judges," guided only by silent constitutional text, would be left "at large" either to replicate and constitutionalize Congress's FOIA exemptions or "to fashion ad hoc standards, in individual cases, according to their own ideas of what seems 'desirable' or expedient." *Houchins*, 438 U.S. at 14.

Respondent chose to take only limited advantage of FOIA. She delayed making any FOIA request for two years, until the time when, even under her theory, emergency injunctive relief was no longer viable. When she did file her FOIA requests with the State Department, the CIA, the National Security Council, and numerous other federal agencies, she was granted expedited processing (see J.A. 34-35), and received a large number of responsive documents.[10] Had respondent "filed her FOIA requests immediately," the court of appeals concluded (Pet. App. 24a-25a)—and respondent apparently agrees (Br. in Opp. 19 n.4)—she could have "obtain[ed] the information" she claims was "necessary to

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[10] The Department of Defense provided 38 documents within five months. Intelligence Oversight Bd., *Report on the Guatemala Review* 42 (June 28, 1996). The CIA provided 105 documents by February 1996, and approximately 300 in total. *Ibid.* Although, as an advisory entity within the Executive Office of the President, the National Security Council is not subject to FOIA, see *Armstrong* v. *Executive Office of the President*, 90 F.3d 553 (D.C. Cir. 1996), cert. denied, 520 U.S. 1239 (1997), the Council informs us that it responded to her request within six months by releasing 58 documents, and that it released an additional 49 documents two months later. The State Department advises that, from June 1995 (six months after her request) to May 1997, it released more than one thousand documents to respondent and, by November 1997, had released more than 2700 documents in whole or in part.

seek an injunction in time to save her husband's life." Respondent now seeks to lay responsibility for the delay at the feet of the government (Pet. App. 24a-25a), but that delay resulted from her voluntary choice. FOIA requests can be filed at any time, by any person, for any reason, without any prerequisite showing of knowledge or need. Respondent chose to forgo that statutory remedy, and to seek information solely through informal contacts with government officials. Those informal channels and FOIA, however, are not mutually exclusive. In any event, respondent's "fail[ure] to pursue aggressively all of [her] legal remedies in the face of what is admittedly a novel legal situation cannot be the basis for visiting liability upon the [petitioners]." *Crowder* v. *Sinyard*, 884 F.2d 804, 815 (5th Cir. 1989), cert. denied, 496 U.S. 924 (1990).

In short, there is no need to convert the Due Process Clause into a Freedom of Information Act, a civil discovery rule, an obstruction of justice law, or a state tort law. Doing so would ignore the Court's "frequent admonition that the Due Process Clause is not merely a 'font of tort law.'" *College Sav. Bank* v. *Florida Prepaid PostSecondary Educ. Expense Bd.*, 527 U.S. 666, 674 (1999) (quoting *Paul* v. *Davis*, 424 U.S. 693, 701 (1976)). Moreover, challenges like those asserted here against high-level "[E]xecutive [Branch] action * * * raise a particular need to preserve the constitutional proportions of constitutional claims." *Lewis*, 523 U.S. at 847-848 n.8.

c. Respondent's due process claim suffers from an additional infirmity: she has failed to demonstrate any "actual injury." *Casey*, 518 U.S. at 349; see also *Crawford-El* v. *Britton*, 523 U.S. 574, 593 (1998) ("proof of an improper motive is not sufficient to establish a constitutional violation —there must also be evidence of causation"). Respondent never filed, or even identified, any legally viable claim that was prejudiced by the alleged withholding of information.

See *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 742-743 (1983) (right of access to the courts protects only "well-founded" lawsuits that have a "reasonable basis" in fact or law). Respondent's complaint asserts in vague terms only that officials deceived her in order to avoid "public embarrassment, censure and/or legal liability," J.A. 32, and that the "concealment * * * foreclosed her from effectively seeking adequate legal redress" to prevent Bamaca's execution, J.A. 44. At oral argument before the court of appeals, respondent's counsel "clarified" that, but for the nondisclosures, respondent "could have sought an emergency injunction based on an underlying tort claim for intentional infliction of emotional distress." Pet. App. 24a. No explanation was given as to how or why that tort suit would have prevented the execution of Bamaca by Guatemalan soldiers, however.

Furthermore, even assuming that the argument of counsel may substitute for the allegations of the complaint, no such tort action lies against the United States. The Federal Tort Claims Act excludes such claims. See 28 U.S.C. 2680(h) (intentional torts excepted, including claims arising out of "misrepresentation");[11] 28 U.S.C. 2680(k) (exception for claims arising in a foreign country). Nor does that Act authorize injunctive relief.[12] More fundamentally, the claim

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[11] See also *Block* v. *Neal*, 460 U.S. 289, 296 (1983) ("the essence of an action for misrepresentation, whether negligent or intentional, is the communication of misinformation on which the recipient relies"); *Thomas-Lazear* v. *FBI*, 851 F.2d 1202, 1207 (9th Cir. 1988); *Metz* v. *United States*, 788 F.2d 1528, 1534-1535 (11th Cir.), cert. denied, 479 U.S. 930 (1986).

[12] See 28 U.S.C. 1346(b)(1) (Supp. V 1999); *Hatahley* v. *United States*, 351 U.S. 173, 182 (1956); *Talbert* v. *United States*, 932 F.2d 1064, 1065-1066 (4th Cir. 1991); *Edelman* v. *Federal Hous. Admin.*, 382 F.2d 594, 596-597 (2d Cir. 1967); see also 5 U.S.C. 702; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-695 (1949). But see *U.S. Information Agency* v. *Krc*, 989 F.2d 1211 (D.C. Cir. 1993), cert. denied, 510 U.S. 1109 (1994).

is illusory, for it apparently would seek to have a federal court order Executive Branch foreign policy and intelligence officials to direct a foreign government to alter its treatment of one of its own citizens engaged in active rebellion against that government. No such justiciable cause of action or remedial power exists. See, *e.g.*, *Department of the Navy* v. *Egan*, 484 U.S. 518, 529-530 (1988) ("foreign policy [is] the province and responsibility of the Executive"); *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial."). See generally *Totten* v. *United States*, 92 U.S. 105 (1875).[13]

The right of access to the courts, moreover, is functionally a right to judicial process. For this reason, the lower courts that have recognized a right-to-access violation in the context of a government cover-up generally have done so when the plaintiff actually attempted to file a lawsuit, and several courts have treated the filing of such a lawsuit as an indispensable predicate of the claim. See *Swekel* v. *City of River Rouge*, 119 F.3d 1259, 1264 (6th Cir. 1997) (unless a plaintiff makes "some attempt to gain access to the courts * * * how is this court to assess whether such access was in fact 'effective' and 'meaningful'?"), cert. denied, 522 U.S. 1047 (1998); *Vasquez* v. *Hernandez*, 60 F.3d 325, 329 (7th Cir. 1995) (availability of state tort action precludes denial of access to the courts claim), cert. denied, 517 U.S. 1156 (1996).

Such a requirement is appropriate because, like analogous Fifth Amendment rights, a constitutional violation does not occur unless and until it is shown that respondent was incapable of seeking redress from the courts.[14] In addition, the

[13] See also *Sovereign Immunity: Hearings Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 135 (1970).

[14] See, *e.g.*, *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 195 (1985) (violation of the Just Compensation Clause "is not 'complete'" until "the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State"); *Hudson* v. *Palmer*, 468 U.S. 517, 533 (1984) (State's deprivation of property "is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy").

actual or attempted lawsuit gives the court a concrete, nonspeculative basis for evaluating whether there was ever a viable lawsuit to present to the courts. In the absence of any predicate lawsuit, respondent asks this Court to speculate as to whether she ever could have pled a case that could have overcome the patent justiciability, sovereign immunity, and national security barriers to her claim, and to declare that her purely hypothesized lawsuit was unconstitutionally frustrated solely by petitioners' allegedly misleading responses to informal requests for information. Cf. *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1092 (1991) (noting "[h]indsight's natural temptation to hypothesize" litigable injury); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 735 (1975) (requiring concrete injury that is not amenable to "subjective hypothesis" to cabin scope of implied cause of action). Such conjecture provides a tenuous basis for the development of constitutional jurisprudence.

3. The Court of Appeals' Rule Would Significantly Chill and Disrupt Communications Between Citizens and Government Officials

On a daily basis, countless Members of Congress, Executive Branch officials, and other government personnel respond to an endless stream of inquiries and requests for information from constituents, the press, and the general public. That constant dialogue and flow of information between government and the governed advances core principles of a democratic society by enhancing the knowledge of government decisionmakers, promoting governmental responsiveness to the public, identifying problems and

solutions for governmental action, and encouraging citizen involvement in the political process.

The court of appeals' decision threatens to paralyze such interchanges. Officials frequently must advise a requester that investigation is necessary before responding further. Resource limitations, rules governing privileged or classified material, or simple human oversight may often prevent a comprehensive response to public inquiries. The court of appeals' decision would transform such responses into potential deprivations of unarticulated constitutional rights, which put the responding government officials at risk of personal liability for compensatory and punitive damages.

Unlike FOIA requests or court orders, which place a contextually limited duty on government officials to provide information, the decision below imposes a free-floating duty in response to virtually any request. The court's rule presumably would extend beyond requests for foreign affairs and intelligence information, to requests by criminal defendants, targets of law enforcement investigations, and prisoners. Criminal defendants might contend that any deceptive statements or "omissions" made by law enforcement officers in an investigation somehow deprived them of their due process rights in the subsequent prosecution. Cf. *Illinois* v. *Perkins*, 496 U.S. 292, 297 (1990) ("Ploys to mislead a suspect or lull him into a false sense of security," without more, do not violate *Miranda*.). Prisoners could add this weapon to their arsenal by seeking information about prison guards, prison security practices, informants, and other inmates, which they could well insist is somehow pertinent to pending or potential lawsuits. Nor would the rule logically be limited to requests for information about the government—the decision logically implicates any government failure to provide information about third parties concerning, for example, contract or trade disputes.

The court of appeals' recognized the potential torrent of lawsuits and attempted to stem the tide by requiring plaintiffs to allege an intent to obstruct litigation. Pet. App. 62a. But that requirement is of little practical utility. Such allegations are "easy to allege and hard to disprove" (*Crawford-El*, 523 U.S. at 585), and can easily frustrate qualified immunity's goal of terminating litigation at the "earliest possible stage." (*Hunter*, 502 U.S. at 227). Such a rule is particularly unhelpful where privileged or classified information is involved, because the government official may actually "intend" to forestall litigation in the limited sense that he broadly intends to delimit any opportunities for and risks of disclosure—of which litigation is one. Accordingly, the court of appeals' rule would largely eliminate qualified immunity in the situation where it is most vital—in the handling of sensitive national security information. Cf. *Halperin* v. *Kissinger*, 807 F.2d 180, 187-188 (D.C. Cir. 1986) (Scalia, Circuit Justice) (adopting a purely objective qualified immunity inquiry for national security cases).

Nor is it a sufficient answer, as the court of appeals suggests (Pet. App. 24a), that government officials can answer informational inquiries with a terse "no comment" and a rigid refusal to assist members of the public. As an initial matter, it is unfathomable that the Founders silently carved into the Constitution such stultifying procedures for communications between citizens and their government. Furthermore, the perhaps unfortunate reality is that the issuance of incomplete information and even misinformation by government may sometimes be perceived as necessary to protect vital interests. *California Motor Transp.*, 404 U.S. at 513 ("Misrepresentations" may be "condoned in the political arena."). Circumstances may require the issuance of false information, for example, about the location and schedule of the President and other high-level government officials, the existence of intelligence operations or contacts with foreign

government officials, or the existence, character, scope, and targets of an ongoing law enforcement investigation. Unless the government adheres to an across-the-board refusal to respond to any requests for information in such areas (again, hardly something the Constitution should be held to require), the public might soon learn to equate a selective "no comment" response with an admission that sensitive governmental operations or programs are underway.[15]

B. Any Arguable Constitutional Obligation To Disclose Foreign Relations And Intelligence Information In Response To An Informal Request For Assistance Was Not Clearly Established

Even if petitioners' actions somehow violated the constitutional right of access to the courts, the petitioners are entitled to qualified immunity because that right was not clearly established when the alleged conduct is said to have occurred. For a right to be "clearly established" under qualified immunity analysis, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). "[I]n the light of pre-existing law the unlawfulness must be apparent." *Ibid.* If government officials "of reasonable competence" could disagree on whether the action is illegal, "immunity should be recognized." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986).

Applying that standard, petitioners should have been accorded qualified immunity because "the constitutional

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[15] Congress recognized this problem when, in FOIA, it expressly authorized the government to offer an effectively misleading response to certain document requests if any other response would reveal highly privileged law enforcement information. See 5 U.S.C. 552(c) (allowing the government, under specified circumstances, to "treat the records as not subject to" FOIA and thus to state that no records responsive to the FOIA request exist); United States Dep't of Justice, *Freedom of Information Act Guide and Privacy Act Overview* 454-455 (May 2000).

question presented by this case is by no means open and shut." *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999). First, for the reasons discussed above, "it is not obvious from the general principles" (*ibid.*) of the right of access to the courts that the extra-judicial withholding of information in response to an informal request by an unincarcerated individual would run afoul of that right. To the contrary, "the contours of the right of judicial access could best be described as 'nebulous.'" *Foster* v. *City of Lake Jackson*, 28 F.3d 425, 430 (5th Cir. 1994).

Second, controlling decisions of this Court pointed in the opposite direction, refusing to supplement the right of access with any generalized duty to provide information. Additionally, there was no controlling precedent from the District of Columbia Circuit, and the authority from other circuits arose in a substantially different factual and legal context. Both *Bell* and *Ryland* involved the *fabrication and falsification* of *evidence* of a *crime* by persons acting in violation of their *legal duties* not to alter such evidence and with the intent to frustrate *colorable* and eminently *foreseeable* causes of action for judicial redress. Here, by contrast, government officials, who were laboring under no legal duty to disclose the requested material and in fact were legally obligated not to disclose classified or privileged information, simply withheld nonpublic foreign affairs and intelligence information in response to an informal request for assistance, and did so without any legally viable cause of action discernible on the horizon. There thus was no "consensus of cases" (*Wilson*, 526 U.S. at 617) establishing the unlawfulness of petitioners' conduct. Surely petitioners were not obligated to be more "creative or imaginative in drawing analogies from previously decided cases," *Jenkins* v. *Talladega City Bd. of Educ.*, 115 F.3d 821, 827 (11th Cir.), cert. denied, 522 U.S. 966 (1997), than the district court (Pet. App. 43a-49a) and

Judges Henderson and Sentelle (*id.* at 70a-71a), who likewise considered the few appellate precedents to be inapposite.

C. The Existence Of An Alternative Remedial Scheme For Obtaining Information From The Federal Government Precludes Inference Of A *Bivens* Action

The existence of statutory avenues for obtaining information from the government not only obviates the need to constitutionalize this area of the law, but *a fortiori* demonstrates that there is no need for the Court to infer a *Bivens* remedy for any constitutional right that may exist. This Court has consistently refused to infer a *Bivens* remedy where Congress already has established an alternative statutory mechanism for addressing the relevant problem. See, *e.g.*, *Correctional Servs. Corp.* v. *Malesko*, 122 S. Ct. 515, 520 (2001).[16]

In *Bush* v. *Lucas*, 462 U.S. 367 (1983), this Court refused to recognize a *Bivens* action for First Amendment violations arising out of federal employment because the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, already provided "comprehensive procedural and substantive provisions" for disputes arising out of the federal employment relationship and gave "meaningful remedies against the United States." 462 U.S. at 368. Likewise, *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), foreclosed a *Bivens* remedy for due process violations in the administration of Social Security, even though Congress's statutory remedy largely restricted claimants to retrospective claims for benefits and excluded damages. *Id.* at 424-425. It was sufficient that "the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms," *id.* at 423, even if Congress left an "absence of statutory relief for a constitutional violation," *id.* at 421. Also, as noted above, the Court in *Malesko* recently refused to infer a *Bivens* remedy against government contractors. "So long as the plaintiff had an avenue for *some redress*," the Court explained, "bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability." 122 S. Ct. at 520 (emphasis added).

[16] Although this argument was not separately raised below, it is logically intertwined with the Questions Presented—especially given the relevance of alternative legal remedies to the constitutional question. As a pure question of law, it is also appropriately considered in light of this Court's recent admonition in *Malesko*, 122 S. Ct. at 519, that *Bivens* should not be expanded to new contexts.

A *Bivens* remedy should not be inferred here because Congress has created a comprehensive framework of statutory mechanisms for seeking information from the federal government. Of primary relevance, the Freedom of Information Act establishes procedures for any member of the public to obtain copies of non-exempt agency documents and records, and embodies "a general philosophy of full agency disclosure." *Department of Air Force* v. *Rose*, 425 U.S. 352, 360 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)). FOIA sets a time frame for agency responses and requires agencies to provide for expedited treatment where appropriate. See 5 U.S.C. 552(a)(6)(A) and (E) (1994 & Supp. V 1999). Judicial review of the agency's response is available, and the court can "enjoin the agency from withholding agency records and * * * order the production of any agency records improperly withheld." 5 U.S.C. 552(a)(4)(B) (1994 & Supp. V 1999). Where warranted, the court also "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred." 5 U.S.C. 552(a)(4)(E).

The Privacy Act of 1974, 5 U.S.C. 552a (allowing access to governmental records pertaining to the requesting individual), the Government in the Sunshine Act, 5 U.S.C. 552b (open meeting requirements), and the Federal Advisory Committee Act, 5 U.S.C. App. at 1 (requiring access to meetings and records of federal advisory committees),

provide additional mechanisms for obtaining information about governmental programs and policies. Like FOIA, each of those statutes makes judicial review available to guarantee agency compliance and, with the exception of the Federal Advisory Committee Act, enumerates specific remedies for agency noncompliance. See 5 U.S.C. 552a(d) and (g); 5 U.S.C. 552b(b), (f)(2), (h) and (i); 5 U.S.C. App. § 10; *Public Citizen* v. *Department of Justice*, 491 U.S. 440 (1989) (assuming the existence of an implied cause of action to enforce the Federal Advisory Committee Act). Taken as a whole, those statutory provisions broadly regulate what government information members of the public can obtain, how they can obtain it, when agencies must respond, and what remedies are available for an agency's failure to comply.

Each statute also contains restrictions on the disclosure of privileged and classified information, including the types of foreign relations and intelligence information sought by respondent here. See 5 U.S.C. 552(b)(1), (3) and (7); 5 U.S.C. 552a(k)(1), (2) and (3); 5 U.S.C. 552b(c)(1), (3) and (7); 5 U.S.C. App. § 10(b) and (d). With respect to intelligence information, in particular, Congress enacted the Central Intelligence Agency Information Act, 50 U.S.C. 431, to moderate FOIA's operation in that sensitive context. See generally *Sullivan* v. *CIA*, 992 F.2d 1249 (1st Cir. 1993) (limiting rights of next-of-kin requesters). Those statutes thus reflect—as a judicially inferred cause of action under *Bivens* cannot—a carefully calibrated congressional balance "between the right of the public to know and the need of the Government to keep information in confidence." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989). FOIA also reflects Congress's delicate remedial balance in authorizing injunctive relief and attorneys' fees, but *not* damages, for the improper withholding of information. This Court should be loath to upset that delicate balance by

superimposing a judicially crafted remedy, given the Constitution's express investment of national security matters in the political branches.[17]

In short, respondent was never "a plaintiff in search of a remedy." *Malesko*, 122 S. Ct. at 523. To the contrary, she at all times had available to her "an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations," *Bush*, 462 U.S. at 388, and that she acknowledges (Br. in Opp. 19 n.4) was capable of providing her all of the information to which she was legally entitled—if she had invoked the procedures in a timely manner.

Finally, supplementation of that elaborate and interlocking system of disclosure obligations would be doubly inappropriate here, because respondent predicates her claim for constitutional relief on an alleged intentional withholding of information pertaining to foreign affairs and intelligence operations. This Court will not infer a *Bivens* remedy where there are "special factors counselling hesitation." *Schweiker*, 487 U.S. at 423; see also *Bivens*, 403 U.S. at 396-397. In *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 273-274 (1990), this Court suggested that matters pertaining to foreign affairs and foreign activities could be special factors counseling hesitation in inferring a *Bivens* remedy, in light of the judiciary's traditional reluctance to delve into such matters. For similar reasons, this Court has declined to

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[17] See *Waterman S.S. Corp.*, 333 U.S. at 111 ("Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."); accord *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 165-166 (1803).

infer a *Bivens* remedy for actions incident to military service because "congressionally uninvited intrusion into military affairs by the judiciary is inappropriate." *United States* v. *Stanley*, 483 U.S. 669, 683 (1987).

The Executive Branch actions for which respondent seeks a judicially imposed *Bivens* remedy all pertain to the withholding of and communications about the United States' relations with a foreign government, intelligence operations and activities between the two governments, the existence of alleged CIA operatives or paid informants within a foreign government, and the knowledge of United States officials about the foreign government's treatment and interrogation of a foreign national engaged in insurrection against a recognized foreign government. Few matters could be less appropriate for judicial superintendence. That fact would have been obvious had respondent filed a timely FOIA request or attempted a timely lawsuit. The result should be no different because respondent instead has asked the courts to mint a novel constitutional tort.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

WARREN CHRISTOPHER, ET AL.,

Petitioners.

—v.—

JENNIFER K. HARBURY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA AND THE AMERICAN CIVIL LIBERTIES UNION AS AMICI CURIAE URGING AFFIRMANCE

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TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

I. INTRODUCTION 2

II. SUMMARY OF ARGUMENT 4

III. ARGUMENT 8

A. Despite Petitioners' Mischaracterization Of The Scope And Functionality Of The Access-To-Courts Doctrine, Respondent's Claim Fits Comfortably Within That Doctrine. 8

B. The Court Should Not Reach The *Bivens* Argument That Petitioners Advance For The First Time In Their Opening Brief And That No Court Of Appeals Ever Has Addressed. 14

C. If The Court Does Reach Petitioners' *Bivens* Argument, The Court Should Reject The Argument. 16

1. Implying A *Bivens* Remedy Would Effectively Deter Egregious Affirmative Misrepresentations By Public Officials

Designed To Prevent Citizens From Learning The Truth And Filing Suit. 17

2. FOIA And Similar Statutes Are Not Remedial In Nature And Do Not Provide Respondent With An Alternative Remedy In This Case. 18

3. A *Bivens* Remedy In This Case — A Case Of Affirmative Misrepresentation — Would Not Jeopardize American Foreign Policy. 21

4. The Purported Impact Of This Type Of *Bivens* Claim On The Public Fisc Provides No Basis For Barring Respondent's Claim. 22

IV. CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Page

Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) 3, 15, 25

Boddie v. Connecticut, 401 U.S. 371 (1971) 9, 10, 11

Bounds v. Smith, 430 U.S. 817 (1977) 5, 11

Bremiller v. Cleveland Psychiatric Inst., 898 F. Supp. 572 (N.D. Ohio 1995) 12, 13

Bush v. Lucas, 462 U.S. 367 (1983) 19

Carlson v. Green, 446 U.S. 14 (1980) 17, 24

Chappell v. Wallace, 462 U.S. 296 (1983) 19

In re Cincinnati Radiation Litig., 874 F. Supp. 796 (S.D. Ohio 1995) 13

Cornett v. Donovan, 51 F.3d 894 (9th Cir. 1995) 12

Corr. Servs. Corp. v. Malesko, __ U.S. __, 122 S. Ct. 515 (2001) 16, 17

Csoka v. County of Suffolk, 85 F. Supp. 2d 117 (E.D.N.Y. 2000) 12

Daniels v. Williams,
474 U.S. 327 (1986) 25

Davis v. Passman,
442 U.S. 228 (1979) 15, 22

Delew v. Wagner,
143 F.3d 1219 (9th Cir. 1998) 11

Don's Sod Co. v. Florida Dep't of Revenue,
661 So. 2d 896 (Fla. Dist. Ct. App. 1995) 12

E.I. duPont de Nemours & Co. v. Train,
430 U.S. 112 (1977) 16

FDIC v. Meyer,
510 U.S. 471 (1994) ..... *passim*

Granfinanciera, S.A. v. Nordberg,
492 U.S. 33 (1989) 15

Griffin v. Illinois,
351 U.S. 12 (1956) 11

In re Howard Ins. Agency, Inc.,
109 B.R. 445 (Bankr. N.D. Okla. 1989) 12

Int'l Ass'n of Firefighters, Local 2069 v. City of Sylacauga,
436 F. Supp. 482 (N.D. Ala. 1977) 11

Jiron v. Mahlab,
659 P.2d 311 (N.M. 1983) 11

Jones v. Clinton,
72 F.3d 1354 (8th Cir. 1996),
aff'd, 520 U.S. 681 (1997) 12

Jones v. FBI,
41 F.3d 238 (6th Cir. 1994) 20

Jun v. Myers,
88 Cal. App. 4th 117 (2001) 12

La. Pac. Corp. v. Beazer Materials & Servs., Inc.,
842 F. Supp. 1243 (E.D. Cal. 1994) 12

Maryland v. Baltimore Radio Show, Inc.,
338 U.S. 912 (1950) 16

Moses v. Hoebel,
646 P.2d 601 (Okla. 1982) 13

Owasso Indep. Sch. Dist. v. Falvo,
No. 00-1073, __ U.S. __, 2002 WL 232853
(Feb. 19, 2002) 14

Owens-Corning Fiberglas Corp. v. Rivera,
683 So. 2d 154 (Fla. Dist. Ct. App. 1996) 13

Roberts v. Galen of Va., Inc.,
525 U.S. 249 (1999) 15

Schweiker v. Chilicky,
487 U.S. 412 (1988) 19, 22

Silver v. Cormier,
529 F.2d 161 (10th Cir. 1976) 12

Swekel v. City of River Rouge,
119 F.3d 1259 (6th Cir. 1997) 11

United States v. Mendoza,
464 U.S. 154 (1984) 16

United States v. Stanley,
483 U.S. 669 (1987) 22

Village of Lake Barrington v. Hogan,
649 N.E.2d 1366 (Ill. App. Ct. 1995) 13

West v. Gibson,
527 U.S. 212 (1999).....15

Williams v. Ill. State Scholarship Comm'n,
563 N.E.2d 465 (Ill. 1990) 13

STATUTES, REGULATIONS AND RULES

28 U.S.C. § 2402.....24

28 U.S.C. § 2674.....24, 25

28 U.S.C. § 2680.....25

28 C.F.R. § 50.15(a)(8)(iii) 23

Sup. Ct. R. 37.3 1

INTEREST OF AMICI CURIAE[1]

Amicus curiae Lawyers' Committee for Civil Rights of the San Francisco Bay Area ("Lawyers' Committee") is a civil rights and legal services organization devoted to advancing the rights of people of color, low-income individuals, immigrants, refugees, and other underrepresented persons. The Lawyers' Committee is affiliated with the Washington, D.C.-based Lawyers' Committee for Civil Rights Under Law, which was created at the behest of President Kennedy in 1963. In 1968, the Lawyers' Committee was established by leading members of the private bar in San Francisco.

Throughout its history, the Lawyers' Committee has dedicated itself to ensuring access to the judicial system, particularly for the most vulnerable individuals and groups in our society. Unreasonable obstacles to ensuring unfettered access to legal redress must be closely scrutinized. The Lawyers' Committee is particularly concerned about any legal precedent that might chill the ability of private citizens to seek legal remedies against government officials who engage in official misconduct.

Amicus curiae American Civil Liberties Union ("ACLU") is a national non-partisan organization of almost 300,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, amici curiae submit this brief urging affirmance of the judgment of the court of appeals. The parties have consented to the filing of this brief, and their written consents are being filed with the Clerk of the Court simultaneously with this brief.

No counsel for a party authored this brief in whole or in part. No person, other than amici curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

Since its founding, the ACLU has sought to ensure that the protections of the Constitution and the Bill of Rights apply equally to all persons. The issues presented in this case, relating to the ability of citizens and others to seek redress against public officials who engage in serious misconduct, are of significant interest to the ACLU and its members.

I. INTRODUCTION

In deciding this case, it is important to keep in mind the exceptional factual allegations that gave rise to Respondent's claim: deliberate and persistent lies by public officials that induced (and that were designed to induce) Respondent not to seek information pursuant to the Freedom of Information Act ("FOIA") and not to bring suit to save her husband's life. In light of the egregious nature of Petitioners' alleged misconduct, Respondent has stated a viable claim for relief, and Petitioners are not entitled to qualified immunity. Respondent alleges that government officials engaged in a prolonged and deliberate pattern of misrepresentations for the very specific purpose of preventing her from obtaining truthful information and filing a lawsuit against the responsible government officials. In other words, Petitioners are alleged to have engaged in a pattern of misrepresentations against Respondent not simply to further their view of government policy but also to induce Respondent not to discover the truth and to file a lawsuit based on the truth.

This lawsuit is not, as Petitioners contend, about the ability of government officials to refuse to disclose sensitive information about the government's foreign policy. Nor is it about the ability of a citizen to intimidate government officials, by threat of suit, into betraying their public trust by revealing such information. That is not what Respondent is claiming, Petitioners' repeated mischaracterizations of her claim notwithstanding.

Rather, Respondent's claim is quite narrow and focused and concerns only the extraordinary and egregious alleged misconduct at issue here. Respondent simply alleges that had these Petitioners not lied to her and misled her, she would have

pursued a FOIA request immediately, would have learned the truth from that FOIA request, and would have brought a lawsuit to save her husband's life, among other things. Respondent alleges that by lying to her for the specific purpose of inducing her not to seek the truth and for the specific purpose of preventing a lawsuit based on the truth, Petitioners succeeded in preventing Respondent from seeking redress from the courts until it was too late to save her husband's life.

That claim comfortably fits into the well-established doctrine of the constitutional right of access to courts. Petitioners' rigid and overly narrow recitation of the doctrine's scope is inaccurate. The doctrine is functional in nature and not dependent upon the erection of physical or "institutional" barriers to filing a lawsuit, as Petitioners argue. The doctrine is implicated when government action — whether formal or informal and whether pursuant to an official policy or an unwritten practice — effectively prevents a person from filing suit and thereby harms that person. As we describe below, courts have applied the doctrine in a variety of contexts that belie the rigidity of Petitioners' analysis.

Nor should the Court accept the invitation of Petitioners and the United States to decide whether a remedy pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), should be implied here in light of FOIA and similar statutes. That issue was neither raised nor decided below, was not among the questions presented in the petition for certiorari, and, to our knowledge, has never been addressed by any court of appeals. Given the extreme nature of the argument — that FOIA and similar statutes providing for access to government documentary records somehow "remedy" intentional and affirmative misrepresentations by government officials that result in damages — the Court should not reach out to decide the issue without fuller litigation in the lower courts and proper presentation to this Court.

The Court should affirm the decision of the court of appeals, but whatever the Court's ultimate disposition of the case, it should limit that disposition to the discrete issues that are

before the Court and should refrain from reaching out for complex and far-reaching issues that have not been presented and that are not necessary to decide the viability of Respondent's claim.

II. SUMMARY OF ARGUMENT

For many years, this Court has held that citizens have a constitutional right to access a judicial forum to pursue claims. The Court repeatedly has invalidated statutes and other provisions that have impeded that protected access. Moreover, courts have held on many occasions that government officials may be liable in damages if they illegally prevent citizens from accessing the courts.

The various types of claims falling within the doctrine belie Petitioners' contention that the doctrine is narrowly confined to "institutional" barriers to filing a lawsuit and formal barriers to lawsuits by prisoners. The doctrine applies to government action — whether formal or informal and whether the result of an official policy or an unwritten practice — that prevents citizens from accessing a judicial forum.

The doctrine, therefore, is implicated not only in a narrow set of factual categories (prisoner cases, cases involving wrongful suppression of evidence, and the like), but in other settings as well. For example, courts have applied the doctrine in the bankruptcy/receivership setting, tax litigation, medical abuse cases, employment cases, divorce cases, products-liability actions, antitrust actions, environmental enforcement actions, contract actions, and other contexts.

The access-to-courts doctrine thus is functional in nature and applies to government action that improperly prevents filing of suit to pursue a claim for relief. The nature of the doctrine and its variable application lead to two conclusions. First, the court of appeals correctly held that Respondent's claim fits within the doctrine's framework. Second, because of the varied contexts in which the doctrine can arise, the Court need not and should not go beyond a determination of whether, as presented in the petition for certiorari, the type of claim that Respondent has

asserted is maintainable. No one — not Petitioners, not the United States — has questioned the continuing vitality of the doctrine or of *Bounds v. Smith*, 430 U.S. 817 (1977), and its progeny. Instead, Petitioners and the United States do no more than argue that the specific facts that Respondent has alleged do not give rise to a cause of action for violation of her right of access to courts under the standards announced in *Bounds* and its progeny. Given that no one is challenging the vitality of the access-to-courts cases beyond the specific type of claim that Respondent has asserted, the Court need not and should not go beyond an assessment of that claim.

Nor should the Court reach the issue of remedy that Petitioners raised for the very first time in their opening brief in this Court — whether, assuming the existence of a constitutional violation, the Court should imply a *Bivens* remedy. Petitioners' primary argument in this regard is that by enacting FOIA and similar statutes, Congress has established a comprehensive regulatory scheme governing requests by citizens for information from the government. Based on that premise, Petitioners conclude that the Court should not imply a constitutional damages remedy for the fact pattern alleged in this case — i.e., deliberate oral lies by federal officials designed to induce Respondent not to file suit.

Petitioners never raised that argument below, the court of appeals (understandably) did not address the issue, and Petitioners did not present it in their petition for certiorari. Moreover, we are unaware of any decision by any court of appeals (and neither Petitioners nor the United States has cited any such decision) that has addressed this issue. Thus, the Court should not reach this novel question and should let the lower courts address it in the first instance.

It is particularly appropriate to defer assessment of the *Bivens* issue given the extraordinary nature of Petitioners' argument. Petitioners, and the United States as well, assert that Congress's creation of a mechanism for citizens to obtain a limited universe of official documentary material effectively occupies the field with respect to the regulation of all

information flow between government and citizens. According to Petitioners, the availability of obtaining written documents under FOIA and similar statutes effects a bar against damages suits for direct oral misrepresentations by public officials.

Petitioners' argument distorts the careful limitations that the Court has placed on the *Bivens* doctrine and mischaracterizes both FOIA and the nature of Respondent's claim. The Court has limited application of the *Bivens* doctrine in three situations: (1) where a damages remedy would not deter misconduct by individual government officials; (2) where an adequate alternative remedy exists to satisfy the plaintiff's claim for compensation and remediation; and (3) where creation of a damages remedy would severely undermine an area of government policy that is both sensitive and delegated to the executive and/or le gislative branch.

None of those limitations denies a remedy to Respondent. Indeed, the only ways that Petitioners and the United States are able to support their argument that FOIA and similar statutes provide Respondent with any "remedy" (and, indeed, an "adequate remedy") are to mischaracterize Respondent's claim as alleging breach of a duty to disclose information and to mischaracterize FOIA and similar statutes as constituting the sole methods of communication between government and citizens. Given that Respondent's claim is based on alleged deliberate, repeated, and affirmative oral misrepresentations designed to prevent her from discovering the truth and to induce her not to file suit — and is not based on breach of a duty to disclose that arguably could have been cured by a FOIA request — and given that FOIA and similar statutes cover but one discrete area of government-citizen communications and say nothing about direct oral communications, Petitioners' argument misses the mark. Petitioners have identified nothing in FOIA or similar statutes that could have remedied Petitioners' alleged lies and the resulting harm to Respondent.

For the same reason, Petitioners' argument that a damages remedy would undermine foreign policy also fails. Again,

disclose sensitive information that would have undermined foreign policy. Instead, Respondent is alleging that Petitioners lied to her in order to prevent her from discovering the truth and to induce her not to file a lawsuit. Whether the government was under any obligation to disclose information to Respondent is a distinct issue from whether Petitioners were under an obligation not to lie to Respondent with the purpose of impeding her ability to sue. And, whether requiring the government to disclose information would undermine foreign policy says nothing about whether requiring government officials not to lie would undermine foreign policy.

Finally, Petitioners' argument that implication of a *Bivens* remedy here would have significant financial consequences for the United States Treasury is without basis. What Petitioners ignore in advancing that argument is that Respondent's access-to-courts claim names individual federal employees in their *personal* capacities and does not name either the United States or any agency of the United States. The United States may choose to indemnify its employees for liability that they incur, but it is factually inaccurate to state that Respondent's claim will automatically drain the U.S. Treasury. Her claim will do no such thing unless the United States chooses to let it do so.

Indeed, to view a *Bivens* claim, as Petitioners suggest, as directly and automatically implicating the U.S. Treasury would undermine the very purpose of *Bivens* — the creation of a deterrent to unconstitutional acts by individual public officials. If *Bivens* is nothing more than an indirect way to sue the United States (a basic premise of Petitioners' public -fisc argument and directly contrary to recent statements by this Court in *FDIC v. Meyer*, 510 U.S. 471 (1994)), then that deterrent effect would be significantly undermined.

Petitioners' public-fisc argument fails for other reasons as well. Respondent's claim is exceptional, to say the least. It is hardly the type of claim that would induce plaintiffs to inundate the courts with similar lawsuits. Compared with claims for which this Court has permitted *Bivens* claims — for example,

scenario of an allegedly illegal search by federal law enforcement officers — permitting people in Respondent's position to seek monetary damages would not have a significant fiscal impact on the government.

III. ARGUMENT

A. Despite Petitioners' Mischaracterization Of The Scope And Functionality Of The Access-To-Courts Doctrine, Respondent's Claim Fits Comfortably Within That Doctrine.

The access-to-courts doctrine is designed to prevent precisely the type of harm that Respondent alleges — government conduct that prevents people from discovering the truth and filing suit based on the truth to vindicate their legal rights. It does not matter whether the conduct reflects formal policy or informal practice or whether the barrier that the government erects physically bars access or does so in other ways. Nor does it matter what the specific subject of the claim is. Respondent's claim that Petitioners deliberately lied to her for the specific purposes of preventing her from discovering the truth and thereby inducing her not to pursue her legal claims falls squarely within the doctrine's framework.

Only by ignoring the functional basis of the access-to-courts doctrine and by rigidly focusing on specific types of barriers and specific subject-matter contexts are Petitioners able to argue that Respondent's claim falls outside the doctrine. Petitioners would have the Court believe that the doctrine applies only in two very narrow contexts: (1) "institutional mechanisms that directly preclude access to the courts"; and (2) "arbitrary restrictions on judicial access for prisoners held in government custody." Pet. Brief at 13. In other words, according to Petitioners, the doctrine only applies to formal policies that bar access to the courthouse and to prisoners who are prevented from filing their complaints.

Access to courts, however, is not nearly as ossified as Petitioners contend. Contrary to the formalistic categories that Petitioners have fashioned, the doctrine's development

evidences a much more functional application arising from the core principle that people should be permitted to access a judicial forum to vindicate significant legal rights and that denial of that access by government officials is improper. The long development of the access-to-courts doctrine thus has given rise to various types of claims in various different subject areas and based on various forms of government action.

One key premise underlying Petitioners' narrow definition of the right of access to courts is that the doctrine is primarily concerned with formal barriers to filing suit — "institutional" barriers. That premise allows Petitioners to discount the misconduct that allegedly occurred here, namely, informal and perhaps isolated acts by public officials designed to prevent Respondent from discovering the truth and from filing suit. Yet, even if Petitioners' conduct was informal and isolated, this Court's articulation of the doctrine is not so formalistic as to exclude such real barriers to accessing the courts.

The Court's decision in *Boddie v. Connecticut*, 401 U.S. 371 (1971), illustrates the point. In that case, the Court held that a required fee for filing for divorce was unconstitutional in that it prevented indigent persons from accessing the courts to terminate their marriages. The fee was not designed to bar access by indigents, but it effectively achieved that end by not providing a waiver based on need. The statute thus was unconstitutional.

The question then becomes whether the *Boddie* holding would have been the same if Connecticut, to remedy the constitutional defect, had provided court clerks with discretion to waive the fee for indigents but if, as an unwritten practice (perhaps because of a hostility to divorce), certain clerks generally (but not always) declined to exercise that discretion. Would the holding have been the same if the court clerk arbitrarily had exercised discretion in refusing to waive Gladys Boddie's filing fee under that unwritten practice?

The answer must be "yes," given that such a regime would just as effectively have barred Ms. Boddie's access to the

courts. From her perspective, it would not have mattered whether the denial of her access to the courts resulted from a rigid "barrier" erected by the legislature or from an informal and flexible practice that only sometimes prevented access. From her vantage point, the government still would have prevented her from accessing a judicial forum. Justice Harlan, writing for the *Boddie* Court, addressed the issue:

> Just as a generally valid notice procedure may fail to satisfy due process because of the circumstances of the defendant, so too a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard. The State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due.

Id. at 380. Thus, *Boddie* — consistent with the access-to-courts doctrine generally — was not concerned with the formality of the policy regarding fees. *Boddie* was concerned with the fact that Gladys Boddie, as an individual in the particular circumstances that she confronted, could not gain access to the courts because she could not afford the filing fee and because Connecticut (whether through formal policy or unwritten practice) insisted that she pay it.

Policy or no policy, law or no law, formality or no formality, government actions resulting in denial of access to the courts are unconstitutional. Petitioners' description of the doctrine, by diverting focus from the policy underlying the doctrine to two formalistic categories of claims comprising a subset of the doctrine, is inaccurate.

Like Petitioners' focus on formal and "institutional" barriers to the courts, their focus on a very narrow set of factual contexts in which the doctrine applies is also unsatisfying and inaccurate. Petitioners focus on a limited array of access-to-

courts cases, including cases in which prisoners are effectively prevented from filing lawsuits, *see, e.g., Bounds v. Smith*, 430 U.S. 817; cases in which indigent persons are prevented from accessing the courts, *see, e.g., Boddie*, 401 U.S. 371; *Griffin v. Illinois*, 351 U.S. 12 (1956); and cases in which law enforcement wrongfully suppresses evidence and thus delays or destroys the ability of a party to file suit, *see, e.g., Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998); *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir. 1997).

These cases, while important embodiments of the doctrine, do not exhaust the types of governmental actions that impermissibly interfere with access to the courts. The differing contexts in which courts have applied the doctrine refute the subject-matter limitations for which Petitioners advocate and underline that the doctrine is defined not by narrow fact patterns but rather by the fundamental principle that people should not be prevented from seeking relief from the judicial branch.

For example, courts have applied the doctrine where a time-consuming administrative prerequisite to filing suit could effectively prevent the plaintiff from obtaining personal jurisdiction over the defendant;[2] where a municipal defendant amended a regulation and thereby prevented public access to documents that could prove the municipality's liability;[3] where a tax statute required that before challenging a tax, the taxpayer prepay the tax and commence an administrative proceeding in

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[2] *See Jiron v. Mahlab*, 659 P.2d 311 (N.M. 1983).

[3] *Int'l Ass'n of Firefighters, Local 2069 v. City of Sylacauga*, 436 F. Supp. 482, 491 (N.D. Ala. 1977) ("[T]he timing and substance of the amendment suggest that its purpose is to quell lawsuits against defendants which could otherwise result from access to the . . . records.").

which constitutional claims could not be raised;[4] where a bankruptcy regulation required bankruptcy trustees to obtain approval from the United States Trustee before filing a final accounting for the bankruptcy estate;[5] where a trial court refused to allow a party to intervene in a receivership proceeding to sue the receiver and refused to allow an independent suit;[6] where a proposed consent decree in a CERCLA enforcement action would have imposed severe daily penalties for violation by the private party without adequate judicial review;[7] and where a stay would require a plaintiff to delay suing the President of the United States for conduct occurring before the President took office.[8]

These are only a few of the contexts in which the access-to-courts doctrine provides a crucial safeguard against government barriers that deny recourse to the judicial process. There are numerous others. *See, e.g., Cornett v. Donovan*, 51 F.3d 894 (9th Cir. 1995) (access to courts by civilly committed individuals); *Silver v. Cormier*, 529 F.2d 161 (10th Cir. 1976) (action in which government official threatened to withhold certain payments that were due and owing if citizen brought suit to enforce contractual obligation); *Csoka v. County of Suffolk*, 85 F. Supp. 2d 117 (E.D.N.Y. 2000) (divorce proceeding); *Bremiller v. Cleveland Psychiatric Inst.*, 898 F.

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[4] *See Don's Sod Co. v. Florida Dep't of Revenue*, 661 So. 2d 896 (Fla. Dist. Ct. App. 1995).

[5] *See In re Howard Ins. Agency, Inc.*, 109 B.R. 445 (Bankr. N.D. Okla. 1989).

[6] *See Jun v. Myers*, 88 Cal. App. 4th 117 (2001).

[7] *See La. Pac. Corp. v. Beazer Materials & Servs., Inc.*, 842 F. Supp. 1243, 1252 (E.D. Cal. 1994).

[8] *See Jones v. Clinton*, 72 F.3d 1354 (8th Cir. 1996), *aff'd*, 520 U.S. 681 (1997).

Supp. 572 (N.D. Ohio 1995) (destruction of documents in sex-discrimination suit); *In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 824 (S.D. Ohio 1995) (medical-abuse case); *Owens-Corning Fiberglas Corp. v. Rivera*, 683 So. 2d 154 (Fla. Dist. Ct. App. 1996) (access to courts violated by products liability statute of limitations); *Village of Lake Barrington v. Hogan*, 649 N.E.2d 1366 (Ill. App. Ct. 1995) (property-rights context); *Williams v. Ill. State Scholarship Comm'n*, 563 N.E.2d 465 (Ill. 1990) (invalidating on access-to-courts ground statute restricting venue for particular suits to one county in large state); *Moses v. Hoebel*, 646 P.2d 601 (Okla. 1982) (setting aside on access-to-courts ground court order that prevented plaintiff from refiling voluntarily dismissed lawsuit without paying certain significant fees).

What these cases make clear is that the right of access to courts is not limited to "institutional mechanisms" that prevent access to courts and to restrictions on access by prisoners. Other forms of government action — and particularly egregious government action such as that alleged in Respondent's narrow claim — that deny access to a judicial forum implicate the doctrine. Accordingly, the principle of ensuring access, rather than the narrow fact patterns that Petitioners propose, should guide the Court. When viewed in that light, Respondent's claim falls well within the principled framework underlying the right of access to courts.

Courts' longstanding application of the doctrine to a variety of impediments points to two conclusions. First, Respondent's claim is the functional equivalent of the many cases in which this Court and other courts have applied the access-to-courts doctrine. Like the cases cited above and those cited in Respondent's brief, this case concerns alleged conduct — lies — by public officials that were designed to prevent Respondent from discovering the truth and suing and that did in fact prevent her from discovering the truth and suing until it was too late. The informal and perhaps aberrational nature of Petitioners' conduct and the fact that the claim arises from a fairly unique fact pattern do not undermine the core nature of the claim.

Second, the Court need not draw broad conclusions about the doctrine as a whole but rather should limit its inquiry to the particular claim that Respondent is asserting. The Court should decide whether this claim is viable and need not extend its inquiry to applications not presented here. Respondent's claim is narrow in nature and should be addressed accordingly.

B. The Court Should Not Reach The *Bivens* Argument That Petitioners Advance For The First Time In Their Opening Brief And That No Court Of Appeals Ever Has Addressed.

Until they submitted their opening brief in this Court, at no point during the litigation did Petitioners raise as an issue the possibility that, even assuming the existence of the constitutional violation that Respondent alleges, the Court should not fashion a *Bivens* damages remedy. Petitioners did not raise the issue in the district court, did not raise it in the court of appeals, and did not raise it in their petition for certiorari. Only when submitting their opening brief did they inject this entirely new and significant issue — one that, to our knowledge, no court of appeals ever has addressed.

The Court should decline the invitation to consider Petitioners' novel argument that no *Bivens* remedy should be fashioned for a claim of intentional and affirmative misrepresentation by public officials resulting in significant harm. First, Petitioners did not properly present the issue or raise and preserve it below. The Court rejected a similar effort just last week. *See Owasso Indep. Sch. Dist. v. Falvo*, No. 00-1073, __ U.S. __, 2002 WL 232853, at *3 (Feb. 19, 2002) ("The parties, furthermore, did not contest the § 1983 issue before the Court of Appeals. That court raised the issue sua sponte, and petitioners did not seek certiorari on the question. We need not resolve the question here as it is our practice to decide cases on the grounds raised and considered in the Court

of Appeals and included in the question on which we granted certiorari.") (citation and quotations omitted).[9]

Indeed, in *Bivens* itself and that case's progeny, the Court declined to consider arguments that the lower courts did not address. *See Davis v. Passman*, 442 U.S. 228, 236 n.11 (1979) ("The en banc Court of Appeals did not decide whether the conduct of respondent was shielded by the Speech or Debate Clause. In the absence of such a decision, we also intimate no view on this question."); *Bivens*, 403 U.S. at 398 ("In addition to holding that petitioner's complaint had failed to state facts making out a cause of action, the District Court ruled that in any event respondents were immune from liability by virtue of their official position. . . . This question was not passed upon by the Court of Appeals, and accordingly we do not consider it here.").

The second reason that the Court should decline to consider Petitioners' belated *Bivens* argument is because of the argument's extraordinary nature (as discussed below) — that a

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[9] *See also Roberts v. Galen of Va., Inc.*, 525 U.S. 249, 253-54 (1999) ("Although respondent presents two alternative grounds for the affirmance of the decision below, we decline to address these claims at this stage in the litigation. The Court granted certiorari on only the EMTALA issue, and these claims do not appear to have been sufficiently developed below for us to assess them in any event.") (footnote omitted); *West v. Gibson*, 527 U.S. 212, 223 (1999) ("These matters fall outside the scope of the question presented in the Government's petition for certiorari. . . . We remand the case so that the Court of Appeals can determine whether these questions have been properly raised and, if so, decide them."); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) ("We decline to address this argument because respondent failed to raise it below and because the question it poses has not been adequately briefed and argued.").

constitutional damages claim based on affirmative misrepresentations to citizens by public officials should be displaced by a statutory scheme that provides no remedy whatsoever for those misrepresentations. Before wading into that fray, the Court should allow this significant issue to be addressed by the lower courts in the first instance. *See, e.g.*, *United States v. Mendoza*, 464 U.S. 154, 160 (1984) (Rehnquist, J.) ("Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari."); *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) ("This litigation exemplifies the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals. By eliminating the many subsidiary, but still troubling, arguments raised by industry, these courts have vastly simplified our task . . . ."); *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) (on denial of certiorari) ("It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.").

Petitioners belatedly are seeking to insert a significant and complicated issue into this litigation. Because neither the lower courts in this case nor any court of appeals has addressed the issue in the first instance, the Court should forego decision.

C. If The Court Does Reach Petitioners' *Bivens* Argument, The Court Should Reject The Argument.

In assessing Petitioners' argument that the Court should not imply a *Bivens* remedy for the constitutional violation forming the basis for Respondent's claim, it is important to focus on the underlying policy of the *Bivens* rule: that legal remedies should exist to deter individual federal officials from committing constitutional violations and that a damages remedy that acts as a deterrent is appropriate unless an adequate alternative remedy exists or unless implication of a damages remedy would undermine some overriding federal policy. *See Corr. Servs. Corp. v. Malesko*, __ U.S. __, 122 S. Ct. 515, 521 (2001) ("The

purpose of *Bivens* is to deter individual federal officers from committing constitutional violations."); *id.* at 523 (noting that federal inmates in privately operated institutions had "full access to remedial mechanisms established by the [Bureau of Prisons]").

Providing Respondent with a damages remedy for Petitioners' misconduct would fulfill the policy objectives of the *Bivens* doctrine, and the Court should reject Petitioners' argument.

1. Implying A *Bivens* Remedy Would Effectively Deter Egregious Affirmative Misrepresentations By Public Officials Designed To Prevent Citizens From Learning The Truth And Filing Suit.

A damages remedy for Respondent's claim would act as a deterrent to misconduct by public officials such as that alleged in this case. Respondent is suing the specific officials who allegedly lied to her and is seeking to hold them liable in their personal capacities. The Court repeatedly has noted that the purpose of the *Bivens* remedy is to deter individual officers from violating the Constitution. *See Meyer*, 510 U.S. at 485 ("It must be remembered that the purpose of *Bivens* is to deter *the officer*."); *Carlson v. Green*, 446 U.S. 14, 21-22 (1980).

This case is a prototype of an effective *Bivens* deterrent. Respondent alleges that Petitioners communicated directly with her and lied to her in order to prevent her from discovering the truth and from commencing a lawsuit against the responsible government officials. A damages remedy against Petitioners in their personal capacities provides the most effective deterrent against further behavior of that sort.

Conversely, failure to imply a *Bivens* remedy here would result in no deterrent at all to this type of misbehavior. Petitioners and the United States describe FOIA and similar statutes in great detail, including the punishment that federal employees can receive for violating the statute. However, at no

point do Petitioners or the United States explain how those mechanisms would deter affirmative lies by public officials occurring outside of the FOIA process that are designed to impede access to the courts. While an official may be disciplined for not complying with FOIA, oral misrepresentations by government officials are not covered by FOIA or the other statutes that Petitioners and the United States have cited. Thus, failure to imply a *Bivens* remedy would eliminate any real deterrent to this type of misconduct with respect to individual officers.

Accordingly, the Court should imply a *Bivens* remedy absent an adequate alternative remedy or other special factors counseling hesitation. As described below, neither Petitioners nor the United States has provided a justification for not implying a damages remedy.

2. FOIA And Similar Statutes Are Not Remedial In Nature And Do Not Provide Respondent With An Alternative Remedy In This Case.

Without a damages remedy, Respondent would be left with no remedy for Petitioners' constitutional violations. FOIA and similar statutes say nothing about the harm suffered as a result of oral affirmative lies by public officials. Petitioners and the United States do not explain how, in light of what is alleged here (i.e., affirmative and deliberate misrepresentations designed to induce Respondent not to sue), Respondent could "remedy" her harm by resorting to FOIA.

The whole basis for Respondent's claim, after all, is that, regardless of other information that might have existed, Respondent relied on Petitioners' alleged direct oral misrepresentations in refraining from filing a FOIA request and filing suit. FOIA does not speak to that harm and, indeed, *could not* speak to that harm in light of Respondent's allegation that Petitioners' alleged misrepresentations induced her not to file a FOIA request in the first place. It is hard to imagine how

FOIA could remedy harm suffered because of conduct that induces a plaintiff not to seek FOIA's benefits.

In each instance in which this Court has held that a *Bivens* action is precluded by an adequate alternative remedial scheme, that alternative remedy has provided the plaintiff with some sort of relief for the injury suffered. The alternative remedial scheme need not provide the plaintiff's entire measure of damages, but it must provide some sort of relief in lieu of a full damages remedy. For example, in *Schweiker v. Chilicky*, 487 U.S. 412 (1988), the Social Security recipients whose benefits had been improperly terminated had received substantial relief from the administrative appeal process, including restoration to disabled status and an award of full retroactive benefits. *See id.* at 417. Thus, although imperfect (for example, the statutory scheme did not provide for consequential damages or damages for emotional distress), the Court held that Congress had created an adequate alternative remedy. *See id.* at 425 ("Congress, however, has not failed to provide meaningful safeguards or remedies for the rights of persons situated as respondents were.").

Similarly, in *Bush v. Lucas*, 462 U.S. 367 (1983), the improperly terminated federal employee had received, through the administrative process, restoration to his former position and back pay. *See id.* at 371. The scheme was intended to "put the employee in the same position he would have been in had the unjustified or erroneous personnel action not taken place." *Id.* at 388 (quotations and footnote omitted). That remedial scheme, although it did not provide every possible remedy, was adequate and thus precluded a *Bivens* damages remedy. *See id.* at 388-89; *see also Chappell v. Wallace*, 462 U.S. 296 (1983) (declining to imply *Bivens* remedy because, in part, soldiers had several remedies for misconduct by superiors, including award of retroactive back pay and retroactive promotion).

Thus, when the Court has held that an alternate remedial scheme precludes a *Bivens* damages remedy, the alternate remedy is one that, after the harm occurs, ameliorates to a significant degree the harm suffered. The alternate remedy

need not be perfect or complete, but it must do something to put the plaintiff in the position (or close to the position) in which he or she would have been absent the wrongdoing.

FOIA and similar statutes do not come close to fitting that bill, given that FOIA is not and never has been a remedial statute. The Sixth Circuit has recognized as much in affirming the withholding of FOIA materials that the plaintiff argued would support his claim that his constitutional rights were violated:

> To the extent that the agency violates the constitutional rights of citizens, there are remedies such as *Bivens* actions, or § 1983 in the case of state and local law enforcement agencies. FOIA was intended as a sunshine measure to bring agency operations to public knowledge within specified limits, not as the primary vehicle for prosecuting agency misbehavior.

Jones v. FBI, 41 F.3d 238, 246 (6th Cir. 1994). Thus, Petitioners' description of the "intricate" FOIA "rights, remedies, and procedures," *see* Pet. Brief at 35-36, is irrelevant. Even if an individual may sue to enforce FOIA and may recover attorneys fees and costs and even if federal employees may be disciplined for violating that statute, that scheme does nothing to deter federal employees from lying to citizens outside of the FOIA process and does nothing to compensate the victims of those misrepresentations.

Respondent's factual allegations prove the point regarding FOIA's inadequacy as a "remedy" in this context. Respondent's claim is that, because of Petitioners' repeated lies to her, she did not file an immediate FOIA request. Rather, she relied on those lies to her detriment by not conducting further investigation, including resort to FOIA. Petitioners, of course, are entitled to dispute as a factual matter the reasonableness of Respondent's reliance. But assuming the truth of Respondent's allegations, as we must at this stage of the litigation,

Petitioners' lies induced her not to take further action until it was too late.

Congress, in enacting FOIA and similar statutes, hardly intended to provide a remedy for plaintiffs victimized by affirmative misrepresentations by government on which they rely to their detriment. Nor does the existence of FOIA and similar statutes do anything to deter public officials from lying to citizens and thereby harming them. Petitioners and the United States have identified no meaningful alternative remedial scheme to defeat implication of a *Bivens* remedy for the constitutional violation that Respondent alleges.

3. A *Bivens* Remedy In This Case — A Case Of Affirmative Misrepresentation — Would Not Jeopardize American Foreign Policy.

Implying a remedy here would not have a detrimental impact on foreign policy. Again, this is not a duty-to-disclose claim, as Petitioners and the United States repeatedly and inaccurately assert. *See, e.g.*, Pet. Brief at 38 ("In this case, the allegations in respondent's *Bivens* action raise issues about whether the highest-ranking State Department and NSC officials may legitimately withhold information from her — even if necessary through deception . . . ."); Brief of Amicus Curiae United States at 37 ("Supplementation of that elaborate and interlocking system of disclosure obligations would be doubly inappropriate here, because respondent predicates her claim for constitutional relief on an alleged intentional withholding of information pertaining to foreign affairs and intelligence operations.").

Rather, the case involves an allegation of affirmative lies by public officials designed to prevent a citizen from filing suit. Deterring public officials from engaging in that type of conduct would not negatively impact United States foreign policy. If public officials do not wish to disclose sensitive foreign-relations information, they need not do so. Moreover, if they wish to assert a defense to a FOIA request or FOIA lawsuit on

the ground that disclosure would jeopardize foreign policy, they can raise that defense.

That prerogative, however, should not become a license to lie to citizens in order to prevent them from discovering the truth and filing suit. We do not disagree with the assertions of Petitioners and the United States about the importance of allowing the government to conduct an effective, and at times secretive, foreign policy. Imposing liability for the affirmative misrepresentations in this case, however, will not undermine the government's ability to do so.

This case is much closer to *Davis v. Passman*, where the Court implied a *Bivens* remedy for conduct occurring within Congress itself, than to *Schweiker* and *United States v. Stanley*, 483 U.S. 669 (1987), where the Court held that the need for military cohesion and the harm that could result from interference by the judiciary in military operations precluded such a remedy. As the Court made clear in *Davis*, it does not reflexively defer to coordinate branches in deciding whether to imply a remedy. Instead, a presumption exists that all public officials are under a duty to obey the law, *see Davis*, 442 U.S. at 245 (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)), and that violations of the law by public officials trigger the jurisdiction of the courts to remedy those violations, *see id.* Only where implication of a remedy would cause significant harm to some articulable federal policy or function is it appropriate to deny a damages remedy. Here, given the nature of Respondent's claim, Petitioners' foreign-policy argument provides no basis to deny Respondent a remedy.

4. The Purported Impact Of This Type Of *Bivens* Claim On The Public Fisc Provides No Basis For Barring Respondent's Claim.

Petitioners' argument regarding the public fisc is equally unpersuasive. As an initial matter, Respondent's *Bivens* claim is against Petitioners in their personal capacities and not against the United States. Although the United States may choose to

indemnify *Bivens* defendants, it is not obligated to do so. The relevant Department of Justice regulation provides

> that neither the Department of Justice nor any agency of the U.S. Government is obligated to pay or to indemnify the defendant employee for any judgment for money damages which may be rendered against such employee; but that, where authorized, the employee may apply for such indemnification from his employing agency upon the entry of an adverse verdict, judgment, or other monetary award . . . .

28 C.F.R. § 50.15(a)(8)(iii). Thus, any impact on the Treasury would be because the United States chooses to indemnify Petitioners and not because the United States is required to pay a damages judgment.[10]

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[10] Thus, *FDIC v. Meyer*, far from supporting Petitioners' public-fisc argument, actually undermines it. In *Meyer*, the Court refused to imply a *Bivens* remedy against a *federal agency*, as opposed to against an individual federal officer, in part because "if we were to recognize a direct action for damages against *federal agencies*, we would be creating a potentially enormous financial burden for the Federal Government." *Meyer*, 510 U.S. at 486 (emphasis added). Respondent, of course, is not asserting her *Bivens* claim against the United States or any agency of the United States.

At no point did *Meyer* so much as suggest that its "financial burden" rationale barred *Bivens* claims against federal officials being sued in their personal capacities. Quite to the contrary, the Court noted that a significant problem with allowing a *Bivens* claim against federal agencies was that such a claim would effectively supplant *Bivens* claims against individual officers and thus undermine the deterrent effect of such claims. *See id.* at 485 ("If we were to imply a damages

(Footnote continued)

Moreover, even assuming the fundamental predicate of Petitioners' public-fisc argument — that Respondent's *Bivens* claim actually impacts the public fisc — Petitioners have not identified any meaningful financial distinction between implying a damages remedy here and implying one in *Bivens* and its progeny. The factual scenario in *Bivens* itself — a Fourth Amendment violation by law enforcement — is a much more common fact pattern than the factual context here and thus is much more likely to generate a significant number of damages awards. Apart from general assertions, Petitioners do not explain why Respondent's particular claim is likely to harm the government's finances.

Petitioners also assert that because the Federal Tort Claims Act ("FTCA") does not permit a damages remedy against the United States for misrepresentations, the Court should not expose the Treasury to *Bivens* liability for the same misrepresentations. Petitioners' reliance on FTCA is misplaced, given that the Court has held in no uncertain terms that FTCA does not preempt *Bivens* claims. *See Carlson*, 446 U.S. at 17-23. Thus, for example, FTCA bars punitive damages against the United States and does not permit jury trials. *See* 28 U.S.C. §§ 2402, 2674. Yet, despite those strict rules — which likely were motivated by a desire to protect the public fisc — this Court has permitted punitive damages and jury trials for *Bivens* claims. *See Carlson*, 446 U.S. at 21-22.

Permitting a somewhat larger scope of liability for *Bivens* actions makes sense because it is more difficult for plaintiffs to

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action directly against federal agencies, thereby permitting claimants to bypass qualified immunity, there would be no reason for aggrieved parties to bring damages actions against individual officers. Under *Meyer*'s regime, the deterrent effects of the *Bivens* remedy would be lost."). *Meyer*'s public-fisc rationale has no bearing at all on Respondent's claim against these Petitioners in their personal capacities.

recover under *Bivens* than under FTCA. To obtain damages based on a *Bivens* claim, a plaintiff must overcome qualified immunity and often must show intent. *See Meyer*, 510 U.S. at 485 (noting that qualified immunity could be defense to *Bivens* action); *Daniels v. Williams*, 474 U.S. 327 (1986) (holding that due-process violation required deliberate indifference). FTCA, by contrast, permits liability based on negligent conduct and does not cloak the government with qualified immunity. *See* 28 U.S.C. §§ 2674, 2680; *Meyer*, 510 U.S. at 485. Thus, a limitation on FTCA liability — the rationale for which may be to limit the scope of government liability based on FTCA's lower threshold — does not apply with the same force in the context of harder-to-obtain *Bivens* liability. And, again, it bears repeating that *Bivens* liability is imposed on individual officers, not the government, meaning that FTCA's policy considerations are less relevant in the *Bivens* context.

In addition (and perhaps most fundamentally), Petitioners' FTCA argument turns the rationale for *Bivens* on its head by asking the Court to refuse to imply a *Bivens* remedy because Congress, in a different statutory scheme pertaining to the liability of the United States itself (as opposed to the personal liability of individual public employees), may have chosen to bar similar claims arising from misrepresentations. Yet, if as Petitioners argue, Respondent lacks a non-*Bivens* claim for Petitioners' misrepresentations (i.e., she lacks an adequate alternative remedy), then under the *Bivens* rationale, Respondent should, if anything, be permitted to assert a constitutional damages remedy. *See Bivens*, 403 U.S. at 410 ("For people in Bivens' shoes, it is damages or nothing.") (Harlan, J., concurring in judgment).

Petitioners' public-fisc argument is a red herring, and the Court should reject it.

IV. CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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R ARGUMENT

(8)

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IN THE

Supreme Court of the United States

WARREN CHRISTOPHER, *et al.*,
Petitioners,

v.

JENNIFER K. HARBURY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF THE BRENNAN CENTER FOR JUSTICE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT .. 1

STATEMENT OF THE CASE 3

ARGUMENT 7

I. ALLEGATIONS THAT A GOVERNMENT OFFICIAL LIED TO A CITIZEN ABOUT GOVERNMENT CONDUCT IN ORDER TO SHIELD THAT CONDUCT FROM JUDICIAL REVIEW STATE A CLAIM FOR A VIOLATION OF A CITIZEN'S RIGHT OF ACCESS TO THE COURTS 7

II. PETITIONERS' ATTEMPT TO DISTORT THE LAW OF STANDING AND REMEDIES TO OBTAIN DISMISSAL OF THIS CLAIM MUST BE REJECTED 18

A. Plaintiff Has Standing Because She Has Alleged Actual Injury. 18

B. *Parratt* Is Inapposite 20

C. Respondents Tort Claims Are Valid 22

D. Respondent Has a *Bivens* Action 23

TABLE OF CONTENTS - continued

III. PETITIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 27

Barrett v. United States, 798 F.2d 565 (2d Cir. 1986) 10, 11, 26, 28

Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984) 10, 11, 26, 28

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) 9

Bounds v. Smith, 430 U.S. 817 (1977) 8

Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964) 9

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 9

Carlson v. Green, 446 U.S. 14 (1980) 24

Chambers v. Baltimore & Ohio Railroad Co., 207 U.S. 142 (1907) 1, 7

Correctional Services Corp. v. Maseko, 122 S. Ct 515 (2001) 24, 25, 26

Crawford-El v. Britton, 523 U.S. 574 (1998) ... 15, 16, 17

Crowder v. Sinyard, 884 F.2d 804 (5th Cir. 1989) 29

Davis v. Passman, 422 U.S. 228 (1979) 24

Delew v. Wagner, 143 F.3d 1219 (9th Cir. 1998) ... 11, 30

Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983) 15

TABLE OF AUTHORITIES - continued

Page

FDIC v. Meyer, 510 U.S. 471 (1994) 25, 26

Foster v. City of Lake Jackson, 28 F.3d 425 (5th Cir. 1994) 29

Halkin v. Helms, 690 F.2d 977 (D.C. Cir. 1982) 15

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 27

Ex Parte Hull, 312 U.S. 546 (1941) 8

Johnson v. Avery, 393 U.S. 483 (1969) 8

Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001) 7

Lewis v. Casey, 518 U.S. 343 (1996) ..... *passim*

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 21

M. L. B. v. S. L. J., 519 U.S. 102 (1996) 7

Malley v. Briggs, 475 U.S. 335 (1986) 27, 30

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) .. 3, 7

Mitchell v. Forsyth, 472 U.S. 511 (1985) 27

NAACP v. Button, 371 U.S. 415 (1963) 10

Nadler v. Mann, 951 F.2d 301 (11th Cir. 1992) 23

Parratt v. Taylor, 451 U.S. 527 (1981), *overruled on other grounds by, Daniels v. Williams*, 474 U.S. 327 (1986) 20

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) 20

TABLE OF AUTHORITIES - continued

Page

Procunier v. Martinez, 416 U.S. 396 (1974), *overruled on other grounds by, Thornburgh v. Abbott*, 490 U.S. 401 (1989) 8

Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983) 10, 12, 26, 28

Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) 14

Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984) 9

Swekel v. City of River Rouge, 119 F.3d 1259 (6th Cir. 1997) 10, 30

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) 24

United States v. Radio Corp. of America, 358 U.S. 334 (1959) 18

United Mine Workers of America v. Illinois State Bar Association, 389 U.S. 217 (1967) 9, 10

United States v. Reynolds, 345 U.S. 1 (1953) 15

United States v. Richardson, 418 U.S. 166 (1974) 14

United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971) 10

Vasquez v. Hernandez, 60 F.3d 325 (7th Cir. 1995) 10, 30

Wilson v. Layne, 526 U.S. 603 (1999) 27

Wolff v. McDonnell, 418 U.S. 539 (1974) 8

TABLE OF AUTHORITIES - continued

Page

MISCELLANEOUS

U.S. Const. amend. I 7

28 U.S.C. § 2679(d) 22

28 C.F.R. § 50.15(a)(8)(iii) 25

S. Ct. Rule 14.1(a) 23

S. Ct. Rule 24.1(a) 24

INTEREST OF AMICUS CURIAE[1]

The Brennan Center for Justice at New York University School of Law unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy with a goal of promoting equality and human dignity, while safeguarding fundamental freedoms. Among the issues on which the Brennan Center works is ensuring that our nation carries out its promise of equal justice for all, a promise that is endangered by the petitioners' position in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves United States citizens' right of access to the courts – "one of the highest and most essential privileges of citizenship," and "the right conservative of all other rights, [which] lies at the foundation of orderly government." *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907).

Petitioners urge the Court to hold that this essential privilege of citizenship is not transgressed when the government lies to a citizen about its involvement in the death of the citizen's spouse, and does so expressly to prevent a judicial challenge to its conduct. This Court could not do so without extinguishing the substance of this right – a right that is "well-established" and that, at its core, forbids government from "actively interfering" with a citizen's "presentation of claims to the courts." *Lewis v. Casey*, 518 U.S. 343, 349-50 (1996). Indeed, it is hard to imagine a denial of access to the

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[1]The parties have consented to the submission of this brief. Their letters of consent have been lodged with the Clerk of this Court. None of the parties authored this brief in whole or in part and no one other than *amicus* or its counsel contributed money or services to the preparation or submission of this brief.

courts more deliberate, pervasive and pernicious than the one at issue in this case. For more than two years, officials throughout the United States Government lied to respondent Jennifer Harbury in an effort to keep her from seeking access to the courts to save her husband's life. Specifically, these officials repeatedly told Harbury they had no information about her husband, when, in truth, they knew – on the basis of official CIA communications – that he had been captured by the Guatemalan military and was being secretly detained and tortured, with the acquiescence (and possible involvement) of U.S. Government agents. The courts of appeals are uniform in recognizing that parallel action covering up official misconduct, and thereby preventing legal claims for redress, violates the right of access to the courts. The case here is even more compelling, for the Government did not merely seek to cover up a murder that had already occurred to avoid monetary relief. In this case the Government denied Harbury the right to use the courts to try to save her husband's life.

It is no answer to say, as petitioners do, that Harbury's right of access to the courts should be subordinated to the national security and foreign policy interests that were purportedly at stake when these officials systematically lied to Harbury. The Government has defenses at its disposal that insulate it from lawsuits that threaten national security interests, but it has not invoked them here. And, as will be demonstrated, petitioners' other arguments seek to distort the law of standing and remedies to prevent Harbury from vindicating a well-established right. These procrustean efforts are required because the conduct Harbury challenges is obviously "active interference" with her ability to go to court to vindicate her claims, and is thus plainly unconstitutional under governing law.

The Court should not accept petitioners' invitation to adopt a rule that would so fundamentally interfere with its own ability to serve as a check on the lawfulness of government action. Instead, this Court should take this opportunity to reaffirm the important principle that ours is emphatically "a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). It is the right of access to courts that ensures that this remains as true today as it was two hundred years ago.

STATEMENT OF THE CASE

Jennifer Harbury, on her own behalf and as administratrix of the estate of her late husband, Efrain Bamaca-Velasquez, brought this lawsuit in 1996 against the State Department, the National Security Council (NSC), and the Central Intelligence Agency (CIA), as well as several officials of those agencies.[2]

Bamaca, a citizen of Guatemala and a commander in the resistance movement, disappeared on or about March 12, 1992 in Guatemala. The Guatemalan Army reported that he had committed suicide during a skirmish between government and rebel troops and was buried nearby. In truth, Bamaca had been captured alive and secretly detained by the Guatemalan military. *Harbury v. Deutch*, Pet. App. 2a-3a. Within a week of his capture, the CIA informed both State Department and NSC officials that the Guatemalan military would likely fabricate his death in order to maximize its ability to obtain information from him. *Id.* at 6a.

In early 1993, Harbury spoke to an eyewitness who indicated that her husband was alive, and was being secretly

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[2]Because this case comes to the Court on a motion to dismiss, the allegations in respondent's complaint are taken to be true.

detained and tortured by the Guatemalan military. *Id.* at 3a. She immediately contacted State Department officials, including several of the petitioners, told them what she had learned, and asked them for information about Bamaca's status. *Id.* These officials promised to look into the matter and to assist her. *Id.* Although they knew of the earlier CIA report indicating that Bamaca was still alive, they lied to her and told her they had no information. *Id.* at 6a.

In August 1993, Harbury opened the grave purportedly holding Bamaca's remains and discovered that the body in the grave was not that of her husband. *Id.* at 3a. She immediately informed petitioner Marilyn McAfee, the Ambassador to Guatemala, who promised to investigate and report back her findings. *Id.* McAfee knew of the CIA report concerning Bamaca. Yet, when she responded to Harbury, she too lied, indicating that no information was available concerning his fate. *Id.* at 6a.

From October 1993 to October 1994, respondent met with various State Department officials, including petitioners, pleading for information. *Id.* at 3a. By then, petitioners had received additional reports about Bamaca. They continued to lie to Harbury, telling her they were seeking information but none was available. *Id.* at 3a-4a.

In October 1994, the CBS news program "60 Minutes" reported that the U.S. Embassy in Guatemala possessed an intelligence report confirming that Bamaca had been captured alive. *Id.* at 4a. The State Department confirmed the report, but insisted it did not know whether Bamaca remained alive. *Id.* Respondent then met with petitioner Anthony Lake, the National Security Advisor, who falsely told her that the Government had "scraped the bottom of the barrel" for

information about her husband but that no further information existed. Suspecting that Lake and other officials were lying, respondent filed a Freedom of Information Act (FOIA)request in January 1995. *Id.*

In March 1995, a member of Congress announced that Bamaca had been killed on the orders of a paid CIA asset. *Id.* at 4a-5a. Shortly thereafter, Harbury was provided documents pursuant to her FOIA request that indicated that Bamaca had been captured, secretly detained, and tortured for approximately 18 months prior to his death by Guatemalan assets who were paid by the CIA to obtain information about the Guatemalan resistance. *Id.* at 3a, 5a. She further learned that State Department and NSC officials, including those who claimed to have no information about Bamaca's fate, had known all along that Bamaca was alive and being tortured. *Id.* at 5a-6a.

Harbury then brought this lawsuit. She asserted, *inter alia*, that petitioners violated her constitutional right of access to the courts by deliberately misleading her into thinking that no information existed about the fate of Bamaca, thereby preventing her from taking the legal action necessary to save his life. Had petitioners not done so, Harbury alleged, she would have learned of the Government's complicity in Bamaca's kidnaping and torture prior to the time of his execution, and sought injunctive relief to save his life.

In March 1999, the District Court dismissed Harbury's constitutional claims. *Id.* at 30a. The court held that she did not state a valid access to courts claim because she did not allege that she had previously sought and failed to obtain a state court remedy. The court went on to hold that even if she had done so, the defendants would be entitled to qualified immunity. *Id.* at 43a-49a.

The D.C. Circuit reversed. The court concluded that the complaint adequately alleged both a claim that Harbury's right to petition the courts had been violated, and that she had been injured as a result – noting that by the time she learned of the Government's complicity in her husband's imprisonment and torture, it was too late to pursue legal action to save his life. *Id.* at 24a-25a. With respect to the petitioners' claim of qualified immunity, the court emphasized that Harbury had alleged deceptions made for the express purpose of preventing her from filing a suit in court. *Id.* at 27a. Given that, and given that every court of appeals to have considered the question had recognized that a government cover-up of facts designed to keep a plaintiff from filing a claim constitutes a violation of the right of access to the courts, the court held that it was "obvious" that public officials may not affirmatively mislead citizens in order to prevent them from testing in court the legality of government officials' actions. *Id.* at 28a.

Denying a motion for rehearing, the D.C. Circuit provided a fuller explanation of its ruling, and responded directly to the arguments petitioners advance here. Rather than "open[ing] the courts to a flood of constitutional access to courts claims," the court explained, its holding applied only to situations where "defendants both affirmatively mislead plaintiffs *and* do so for the very purpose of protecting government officials from suit." *Id.* at 61a-62a (emphasis in original). The court further noted that Harbury's claim was permitted because "defendants' actions 'completely foreclosed' one of her primary avenues of relief" and because "most of the essential facts" of her cause of action were hidden. *Id.* (internal citations omitted). Finally, in response to the assertion that the holding below would harm national security, the court noted the defendants had failed to raise a national security defense, but that they remained free to do so. *Id.* at 62a.

ARGUMENT

I. ALLEGATIONS THAT A GOVERNMENT OFFICIAL LIED TO A CITIZEN ABOUT GOVERNMENT CONDUCT IN ORDER TO SHIELD THAT CONDUCT FROM JUDICIAL REVIEW STATE A CLAIM FOR A VIOLATION OF A CITIZEN'S RIGHT OF ACCESS TO THE COURTS.

The question in this case is narrow, but critically important: whether the Government violates a citizen's right of access to the courts by deliberately lying to that citizen about the existence of critical information that would substantiate a legal challenge to the government's conduct, and does so expressly to prevent the citizen from bringing such a challenge. The question answers itself.

The right of access to the courts is "well-established." *Lewis v. Casey*, 518 U.S. at 350. The right is rooted in the Due Process Clause of the Fifth Amendment, as well as the First Amendment right "to petition the Government for a redress of grievances." U.S. Const. Amend. I. It is "one of the highest and most essential privileges of citizenship." *Chambers*, 207 U.S. at 148. Indeed, it is the "very essence of civil liberty." *Marbury v. Madison*, 5 U.S. at 163. It serves as a fundamental check on "the awesome authority of the State." *M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996). Without it, our system would cease to be a "government of laws, and not of men." *Marbury*, 5 U.S. at 163; *see also Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545-46 (2001) (invalidating governmental program that sought "to insulate the Government's laws from judicial inquiry" and noting that such a scheme is inconsistent with "accepted separation-of-powers principles").

At its core, this constitutional right protects against governmental action "actively interfering" with a citizen's ability to press a legal claim in the courts. *Lewis,* 518 U.S. at 349-50. *See* Brief of United States as Amicus Curiae Supporting Petitioners, at 8 ("Gov. Br.") (right of access is "a negative prohibition on governmental conduct that prevents an individual from presenting independently identified grievances to a court of law"). The Court has acknowledged and enforced this right in a variety of settings. The Court has, for example, invalidated regulations that allowed prison officials to prohibit prisoners from filing court documents. *See Ex Parte Hull*, 312 U.S. 546, 548-49 (1941) ("Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine.") (citations omitted). Restrictions on prisoners' ability to obtain assistance in preparing and filing claims have also been invalidated on the ground that they "unjustifiably obstruct the . . . right of access to the courts." *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) (invalidating regulation prohibiting use of law students to interview prisoners) *overruled on other grounds* by *Thornburgh v. Abbott,* 490 U.S. 401 (1989); *Johnson v. Avery*, 393 U.S. 483, 490 (1969) (invalidating regulation barring inmates from assisting other inmates in preparing habeas petitions); *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974) (striking down rule barring inmates from assisting in preparing certain claims, and noting that "[t]he right of access to the courts . . . assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights"). Indeed, prisons must provide prisoners with some affirmative assistance to ensure that their ability to seek access to the courts is "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977).

Similarly, federal statutes cannot be construed to "actually affect the exercise" of the right of access, even where the Government's underlying purpose is laudable. Thus, for example, in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), the Court declined to construe the National Labor Relations Act to prohibit an employer from suing an employee, even if the employer was seeking to retaliate for union activity. Because the "First Amendment right of access to the courts" is so fundamental, the Court held, "[t]he filing and prosecution of a well-founded lawsuit may not be enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act." *Id.* at 742-43; *see also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984) (the "First Amendment right protected in *Bill Johnson's Restaurants* is plainly a 'right of access to the courts . . . for redress of alleged wrongs'") (internal citation omitted); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (holding good-faith litigation protected against antitrust action on the ground that the "[t]he right of access to the courts is . . . one aspect of the right of petition").[3]

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[3]This Court has also struck down prohibitions on referrals to attorneys that impaired an individual's access to the courts. In *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1963), the Court invoked the First Amendment to invalidate an injunction prohibiting referrals to specific lawyers. "The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights." *Id.* at 7. Similarly, in *United Mine Workers of America v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967), the Court invalidated a state decision prohibiting unions from employing attorneys to represent their members in workers' compensation claims. Noting that "to petition for a redress or grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights," *id.* at 222, the Court explained that "[w]e have . . . repeatedly held that laws which actually affect the

Drawing on these precedents, the courts of appeals have uniformly held that the Government violates the right of access to the courts by deliberately using falsehoods to conceal from a citizen facts that, if known, would have provided the citizen with grounds to seek legal redress. *See Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984) ("[The right of access] is lost where, as here, police officials shield from the public and the victim's family key facts which would form the basis of the family's claims for redress."); *Ryland v. Shapiro*, 708 F.2d 967, 973-75 (5th Cir. 1983) (A litigant's right is prejudiced by "[c]onduct by state officers which results in delay in the prosecution of an action in state court."); *Barrett v. United States*, 798 F.2d 565, 575 (2d Cir. 1986) ("Unconstitutional deprivation of a cause of action occurs when government officials thwart vindication of a claim by violating basic principles that enable civil claimants to assert their rights effectively."); *Vasquez v. Hernandez*, 60 F.3d 325, 328 (7th Cir. 1995) ("[W]hen police officers conceal or obscure important facts about a crime from its victims rendering hollow the right to seek redress, constitutional rights are undoubtedly abridged."); *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir. 1997) ("[I]f a party engages in actions that effectively cover-up evidence . . . they have violated his right

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exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil." *Id.*; *see also United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971) (striking down injunction that barred a union from providing assistance to its members, and reaffirming decisions holding that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment"); *NAACP v. Button*, 371 U.S. 415, 444 (1963) (striking down a Virginia statute that prohibited the NAACP from directing potential litigants to NAACP staff attorneys).

of access to the courts."); *Delew v. Wagner*, 143 F.3d 1219, 1222 (9th Cir. 1998) ("[T]he Constitution guarantees plaintiffs the right of meaningful access to the courts, the denial of which is established where a party engages in pre-filing actions which effectively covers-up evidence.").

The Second Circuit's decision in *Barrett* is particularly instructive. *Barrett* involved the death of a patient who had been administered the hallucinogenic drug mescaline against his will in a state-run psychiatric hospital. The Army Chemical Corps provided the drug as part of an experiment. The Corps conspired with the attorney representing the state to hide these facts. Although the estate was informed that all information that existed had been provided, pursuant to the cover-up a great deal of information was withheld, and relevant documents (the existence of which was hidden) were sent to another state in order to evade discovery. The Second Circuit concluded that the conspiracy amounted to an unconstitutional denial of access to the courts. Although the federal officials "were not under any duty to volunteer to the estate information that would alert it to the existence of a claim," the court concluded, "the government officials were not free to arbitrarily interfere with the estate's vindication of its claims." 798 F.2d at 575.[4]

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[4]Similarly in *Bell*, police officers shot and killed an unarmed man, then covered up their actions to prevent the family from seeking legal redress. The court observed that a right to petition the courts exists, and that "[t]o deny such access defendants need not literally bar the courthouse door or attack plaintiffs' witnesses." 746 F.2d at 1261. Instead, "[t]his constitutional right is lost where . . . officials shield from the public and the victim's family key facts which would form the basis" of a claim. *Id.* A contrary conclusion, the court recognized, would simply encourage government officials to lie to prevent the vindication of protected rights. In *Ryland*, the Fifth Circuit reached the same result where a government official murdered a woman, and other government officials conspired to conceal the murder by falsifying the cause of death and lying about the

The official conduct Harbury challenges in this case is active interference with her ability to vindicate her legal rights in court. It is precisely what this Court described in *Lewis* as the core of the protected right. As in *Barrett*, the relevant information was not classified (indeed, it was later released in response to a FOIA request). Nonetheless, government officials lied to her over the course of two years, repeatedly telling her that no information existed when, in fact, it did. They did so to prevent her from learning about this information and using it to file a claim. And they succeeded. Because Harbury believed what she was told, she did not learn the true facts of her husband's detention until he was dead. These allegations squarely state a violation of the right of access even as that right is framed by the Government in this case – "a negative prohibition on governmental conduct that prevents an individual from presenting independently identified grievances to a court of law." Gov. Br. at 8.

Lacking any persuasive answer to the allegations Harbury has actually made, petitioners (and the Government) proceed to set up and knock down a series of straw men. First, they contend that the D.C. Circuit unduly expanded the right of access by imposing an affirmative obligation to disclose information that might allow a citizen to sue. The mere withholding of information, they insist, does not violate the Constitution. This case does not, however, present that question. It involves an allegation that government officials deliberately lied for the express purpose of preventing access to courts. *See, e.g.*, Pet. App. 23a ("[T]he government misreads Harbury's complaint. She never alleges that defendants

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evidence that existed. The Fifth Circuit had no difficulty concluding that such a course of conduct represented "wrongful interference by the defendants with the Rylands' access to the courts." 708 F.2d at 973.

breached a duty to disclose information to her. Rather, she alleges that they affirmatively deceived her. . . ."). Harbury alleges a *negative prohibition* – government officials may not deliberately lie about the existence of critical facts for the purpose of shielding government conduct from a challenge in court.

Next, petitioners contend that the right Harbury asserts would transform every instance of official deception into an unconstitutional denial of access to the courts. But this "floodgates" argument is simply wrong – as petitioners' own examples prove. In none of the situations they posit did the Government act for the purpose of preventing an individual from testing the legality of government conduct in a claim presented to a court. Thus, sting operations may involve lies told by government officials, but the *purpose* is to discover evidence that will allow the Government to prosecute not, for example, to prevent a detainee from challenging the legality of his detention. *See* Pet. Br. at 19. Similarly, federal prosecutors may finesse an inquiry *in order to safeguard confidentiality*; a White House press officer may give a cagey response to inquiries about ongoing military operations *in order to protect those operations*; a Federal Reserve Board official may decline to provide information *in order to avoid destabilizing the economy*; and a FOIA clerk may issue a form letter indicating a prompt response is forthcoming despite his knowledge of a large backload of such requests, presumably in order to comply

with statutory requirements or internal regulations.[5] The dire consequences petitioners predict will simply not materialize.

Indeed, it is not the implications of recognizing this narrow right, but the implications of rejecting it that are far-reaching and extreme. Petitioners would have this Court hold that government officials are free to lie at will to citizens for the express purpose of shielding government conduct from judicial scrutiny. That principle has no limits. Thus, in petitioners' view, if an official engaged in a gross constitutional violation (beating a suspect to death, for example, in an attempt to extract a confession), no constitutional principle would prevent the official from lying to the victim's relatives about what had occurred to prevent them from suing the official. Similarly, if an official unlawfully detained an individual, no constitutional principle would prevent the official from lying about the whereabouts of that person to prevent others from going to court to seek his release. The rule posited by petitioners would not only encourage officials to lie, it would encourage them to lie vigorously and consistently. If the truth is never revealed, the official will never be penalized; if, by contrast, the truth is discovered, the official would be in no worse a position than if he had not engaged in a cover-up in the first place.

None of petitioners' remaining arguments warrants the adoption of such an extreme position. The national security interests to which they allude, *see* Pet. Br. at 21, 48, provide no

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[5]Moreover, such claims would almost certainly fail for lack of standing. Outside of certain alleged violations of the Establishment Clause, the Court has held firmly to the rule that plaintiffs do not have standing to bring claims against the Government unless they show direct, *individualized* harm as a result of government conduct. *See, e.g., United States v. Richardson*, 418 U.S. 166, 179-80 (1974); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 219-20 (1974).

basis for rejecting application of the right in this core context. As an initial matter, the vast majority of cases involving officials' deception designed to interfere with a citizen's ability to petition the courts do not implicate national security. And there is no need to distort the general rule to guard against the rare case in which national security is purportedly implicated. Adequate institutional mechanisms exist to safeguard the government's interests where national security is genuinely at stake. The Government is free to seek dismissal based on the national security defense.[6] If a court deemed it necessary to allow discovery before ruling on the defense, the state secrets privilege can be invoked. That privilege allows government officials to avoid submitting to discovery altogether on a showing that "there is a reasonable danger that compulsion of the [requested] evidence will expose military matters which, in the interest of national security, should not be divulged." *United States v. Reynolds*, 345 U.S. 1, 10 (1953).[7]

Other substantive and procedural safeguards address petitioners' remaining complaints. Specifically, petitioners assert that government officials will be exposed to excessive litigation because a plaintiff can always allege that preventing access to courts was one of many motives underlying a government official's deceit. In *Crawford-El v. Britton*, 523 U.S. 574 (1998), however, this Court addressed these concerns.

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[6]Petitioners do not dispute this, but instead, curiously assert that the national security defense should rarely be invoked, and that this Court should decline to recognize this entire category of claims to guard against the remote possibility that there would ever be a reason to invoke it. Pet. Br. at 22.

[7]Such a showing can be made by submitting affidavits, *in camera* if necessary, to lend support to the rationale provided by defendants for invocation of the privilege. *Ellsberg v. Mitchell*, 709 F.2d 51, 58-59 (D.C. Cir. 1983); *Halkin v. Helms*, 690 F.2d 977, 992-93 (D.C. Cir. 1982).

There, the Court invalidated a rule adopted by the D.C. Circuit which required a plaintiff to prove an unconstitutional motive by clear and convincing evidence. The concern underlying the rule was the same as that raised here – claims regarding "an official's state of mind [are] easy to allege and hard to disprove." *Id.* at 585. As the Court explained, adequate safeguard already exist. Even "proof of an improper motive is not sufficient to establish a constitutional violation – there must also be evidence of causation." *Id.* at 593. In the First Amendment context, for example, once a public employee shows that "protected speech was a 'motivating factor' in an adverse employment decision," the burden shifts to the employer to show that "it would have reached the same decision in the absence of the protected conduct." *Id.* (*quoting Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). The employer prevails if it satisfies the burden. Accordingly, petitioners here could prevail if they demonstrate that they would have engaged in the same behavior to further some as yet unarticulated legitimate purpose, even if a desire to avoid litigation was also a "motivating factor."[8]

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[8]Other safeguards also exist that allow a court to "weed out baseless claims that feature a subjective element." *Id.* A district judge may, for example, "order a reply to the defendant's or a third party's answer under Federal Rule of Civil Procedure 7(a), or grant the defendant's motion for a more definite statement under Rule 12(e)." *Id.* at 598. In addition, if the defendant pleads the affirmative defense of qualified immunity, the district court can "resolve that threshold question before permitting discovery." *Id.* Petitioners half-heartedly assert that these protections are insufficient to protect "the important benefits . . . [of] qualified immunity, which is an '*immunity from suit* rather than a mere defense to liability.'" Pet. Br. at 21 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)) (emphasis in original). *Crawford-El* disposed of this objection as well, however, noting that even though "[d]iscovery involving public officials is indeed one of the evils that [the doctrine of qualified immunity] aim[s] to address," the Court's decisions *never* created "an immunity from *all* discovery." 523 U.S. at 593 n.14 (emphasis in original).

That is not to say, however, that an official can avoid liability merely by asserting that his ultimate purpose was legitimate. Legitimate purposes may not be achieved via unlawful means. The right of access to the courts is violated when a government official deceives a citizen to insulate those means from judicial review. Thus, an official who beats a suspect to death while trying to extract a confession, then lies about it to avoid being sued, could not defend against an access to courts claim by asserting that his ultimate purpose was to deter crime. Similarly, in this case, if petitioners lied to Harbury in order to prevent her from going to court to test the legality of her husband's detention and torture, she has alleged a violation of her right of access to the courts even if petitioner's "ultimate purpose" was, for example, to obtain information about the insurgency in Guatemala. Petitioners could thus prevail only if they demonstrate they would have deceived Harbury for reasons wholly unrelated to a desire to prevent her from seeking to challenge the legality of officials' involvement in the detention and murder of her husband. Because she has alleged that they cannot do so, she has stated a claim of violation of the right of access to the courts.[9]

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[9]Harbury alleged that "Defendants intentionally misled Plaintiff . . . because, while [her husband] was still alive, they did not want to threaten their ability to obtain information from Mr. Bamaca through his detention and torture, and because, at all times, they did not want their role or the role of any of the other Defendants in Mr. Bamaca's secret imprisonment, torture and extrajudicial execution to be revealed. . . . *Defendants feared that, if Plaintiff sought legal redress, these objectives would be undermined.*" J.A. 50 ¶ 171 (emphasis added).

II. PETITIONERS' ATTEMPT TO DISTORT THE LAW OF STANDING AND REMEDIES TO OBTAIN DISMISSAL OF THIS CLAIM MUST BE REJECTED.

None of petitioners' remaining arguments for reversal has merit.

A. Plaintiff Has Standing Because She Has Alleged Actual Injury.

Contrary to petitioners' claim, "exhaustion" of state court remedies is not a precondition to pleading an access to courts claim. Exhaustion applies where initial jurisdiction over a claim has been delegated to an agency or similar entities; "judicial interference is withheld until the administrative process has run its course." *United States v. Radio Corp. of America*, 358 U.S. 334, 346 n.14 (1959). Here, no claim has been entrusted to another agency in the first instance. Exhaustion is thus inapplicable.

Petitioners' argument regarding the degree of harm a plaintiff must demonstrate to state a claim is equally meritless. Specifically, petitioners assert that once a plaintiff learns of government officials' deception, she must bring the claims she would have brought had the deception not occurred. Pet. Br. at 24-25. If she obtains any relief whatsoever, no matter how ineffective, petitioners contend, she is barred from bringing an access to courts claim. *Id.* at 28-29.

That is not the law. As this Court explained in *Lewis*, principles of standing require a plaintiff alleging a violation of access to courts to demonstrate "actual injury." *Lewis*, 518 U.S. at 349. But injury is not cabined to cases in which all relief has been cut off. As the *Lewis* Court held, in the context

of an access to courts claim, injury exists if defendants' conduct "hindered [plaintiff's] efforts to pursue a legal claim," *id.* at 351, or, stated differently, that a "legal claim had been frustrated or was being impeded." *Id.* at 353.

Harbury meets that test. At the time petitioners lied to her, her husband was alive. But for the cover-up, she could have obtained information about his plight and sought injunctive relief that might have saved his life. Pet. App. 24a. The delay caused by petitioners' deception prevented her from doing so; by the time she obtained the relevant facts her husband had been killed. *Id.* Thus, her only avenue now is to seek damages against the officials involved. Petitioners suggest that damages are adequate, and urge this Court to hold that Harbury has not suffered cognizable injury even if she can demonstrate that petitioners' actions prevented her from obtaining an injunction that could have saved her husband's life. Pet. Br. at 27-29. No precedent, and no principle, countenances such a grotesque result.

The cases cited by petitioners are not to the contrary. Those cases stand for the proposition that harm cannot be assumed, but instead must be demonstrated. A plaintiff could do this by pursuing the claims she would have otherwise brought and, once those proceedings are concluded, filing a separate access to courts claim pointing to any prejudice she suffered. But she need not always pursue this particular course. Indeed, in certain circumstances it would be senseless to do so. Where events occurring during the time when critical facts were concealed will necessarily prevent a plaintiff from obtaining complete or effective relief, a plaintiff can allege harm without first seeking to vindicate her underlying claims. That is precisely what the court below concluded, and that eminently sensible conclusion should be affirmed.

B. *Parratt* Is Inapposite.

Petitioners' reliance on this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), is similarly misplaced, and their extended discussion of the adequacy of existing post-deprivation remedies is beside the point. *See* Pet. Br. at 26. In *Parratt*, the Court examined whether an official's negligent loss of a prisoner's property violated the prisoner's procedural due process rights given the existence of adequate post-deprivation procedural protections. 451 U.S. at 537. The question here is not whether petitioners provided respondent with adequate procedural safeguards before lying to her. Instead, Harbury has asserted a substantive right to access the courts that was abridged when the Government deliberately interfered with her ability to bring a claim. *See, e.g., Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992) (holding that the Due Process Clause "has been understood to contain a substantive component, . . . one 'barring certain government actions *regardless of the fairness of the procedures used to implement them*") (emphasis added). *Parratt* does not speak to that issue.

Moreover, petitioners misstate the breadth of *Parratt*'s holding. In *Parratt*, the Court concluded that post-deprivation processes can satisfy procedural due process requirements in certain circumstances involving the loss of property. This is true primarily where it is impractical to provide "a full and meaningful [pre-deprivation] hearing." 451 U.S. at 539-41. The mere fact that *some* remedy may later be available is insufficient, however. Such a post-deprivation hearing would not suffice for constitutional purposes if it did not provide "full compensation" for the lost property. *Id.* at 543-44; s*ee also id.* at 540 ("The fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner.'")

(internal citation omitted). As this Court explained in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), a post-deprivation process is constitutionally inadequate if it does not "make the complainant entirely whole." *Id.* at 436-37.

Thus, even if the notion of adequate post-deprivation process could somehow be imported into this context – and it cannot – the existence of other potential claims does not defeat Harbury's access to courts claim. The only opportunity to meaningfully redress the harm caused by Bamaca's capture and torture was extinguished as soon as he was killed. By lying and preventing her from testing the legality of the Government's actions, petitioners absolutely denied respondent a "meaningful" opportunity to bring a case that might have saved her husband's life. "[E]ven a successful suit will not vindicate entirely" the injury she suffered. *Logan*, 455 U.S. at 437.

Indeed, the "alternative remedies" suggested by petitioners are either irrelevant or inadequate. *See* Pet. Br. at 27-28; Gov. Br. at 13-18. The equitable tolling doctrine is inapplicable because Harbury's inability to obtain adequate relief is not a result of being time barred. Similarly, a cause of action for intentional spoliation of evidence is inapposite because Harbury does not assert that petitioners destroyed evidence, but that petitioners prevented her from discovering evidence until it was too late. Indeed, the Government chastises respondent for not taking advantage of FOIA before "emergency injunctive relief was no longer viable," despite the fact that it was government officials who lied to her precisely so that she would not seek information through such a channel. Gov. Br. at 17.[10]

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[10]The "discovery tools and judicial sanctions" petitioners allege can be used to "redress any alleged misconduct," Pet. Br. at 28; *see also* Gov. Br. at 15-16, are similarly inapplicable as the acts alleged did not take place during the course of a judicial proceeding. That "[c]riminal sanctions and

C. Respondent's Tort Claims are Valid.

Petitioners are thus left with the argument that even if they had not lied to her and she had all the information she now possesses, there was no claim Harbury could have brought. *See* Pet. Br. at 31. That argument is wrong. Harbury could have brought tort claims including intentional infliction of emotional distress or loss of consortium against petitioners in their individual capacity. These are well-established causes of action and, pursuant to each, injunctive relief can be obtained. Neither petitioners nor the Government disputes this. Instead, each resorts to conjecture about how such claims might have been litigated and why they might not have been successful. *See* Pet. Br. at 31; Gov. Br. at 24. In particular, both petitioners and the Government assume that had such a claim been brought, the Government would have certified that defendants were acting within the scope of employment, the Government would have thus been deemed the defendant, and the case would have been barred by the Federal Tort Claims Act. But none of this would necessarily have occurred. The Government, for example, might have declined to make the required certification. *See* 28 U.S.C. § 2679(d). That is not merely conjecture; this very case was litigated for almost *five years* before the Government chose

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penalties for obstruction of justice, tampering with evidence, perjury, or other illegal acts" could be initiated by the Department of Justice or some other law enforcement agency with jurisdiction over petitioners' misconduct, *see* Pet. Br. at 28-29; Gov. Br. at 14-15, is irrelevant. Even if a criminal case had been brought, it would not vindicate Harbury's claim. *See Ryland*, 708 F.2d at 973.

to make the certification necessary to transform the suit into one against the United States.[11]

This illustrates the wisdom of the rule that the right to bring claims that are "arguable (though not yet established)" is protected. *Lewis*, 518 U.S. at 353 n.3. A plaintiff who has been harmed by government officials' conduct is entitled to go to court and attempt to prove her claim. Years after the fact, it is easy to speculate about the chain of events that might or might not have occurred, and the various obstacles she might have encountered in doing so. But such a theoretical exercise does not defeat her right to present a claim unless it is *certain* that she could not have prevailed under any set of facts (that is, her claim was frivolous). *See, e.g., id.* Having successfully prevented her from presenting a claim, petitioners cannot now be heard to complain that had they not interfered, she might not have prevailed in any event. As the court of appeals correctly held, "*any* ambiguities or doubts concerning the sufficiency of the claim must be resolved in favor of the pleader." Pet. App. 63a (internal quotation and citation omitted).

D. Respondent Has a *Bivens* Action.

There is no merit to petitioners' contention that a *Bivens* remedy would be inappropriate in this context. *See* Pet. Br. at 33-39. First, petitioners seek to raise this issue for the first time in their merits brief, a practice prohibited by Rules 14.1(a) (limiting the issues this Court will consider to those "set out in

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[11]Moreover, even had the government chose to make the requisite certification, Harbury could have appealed on the ground that some or all of the conduct alleged fell outside the scope of their employment. *See, e.g., Nadler v. Mann*, 951 F.2d 301, 305-06 (11th Cir. 1992).

the petition, or fairly included therein"), and 24.1(a) (providing that a brief on the merits "may not raise additional questions or change the substance of the questions already presented" in the petition). These rules apply with particular force where, as here, the issue was not passed on by the courts below. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992). Accordingly, this Court should decline to address petitioners' *Bivens* argument.

In any event, the argument fails on the merits. No "special factors" counsel against a *Bivens* remedy here. First, Congress has not provided an adequate, alternative remedy. That counsels in *favor* of recognizing a *Bivens* remedy, because the whole point of *Bivens* was to provide a cause of action where alternative remedies were unavailable. *See Correctional Serv. Corp. v. Malesko,* 122 S. Ct. 515, 521 (2001); *Davis v. Passman*, 422 U.S. 228, 245 (1979).

It is no answer to point to the "comprehensive framework of statutory mechanisms for seeking information from the federal government." Gov. Br. at 27; Pet. Br. at 34. Each of the statutes cited by petitioners and the Government simply provides a mechanism through which individuals can seek access to information from the Government. None of the statutes is remedial in nature, and none purports to provide "meaningful, even if incomplete, relief" for the constitutional deprivation at issue here. Pet. Br. at 34.[12]

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[12]Although respondent is currently pursuing tort claims based on various officials' underlying conduct, those claims do not relate to the actions of the petitioners in this proceeding. Indeed, petitioners concede that, pursuant to this Court's decision in *Carlson v. Green*, 446 U.S. 14 (1980), the FTCA is not a meaningful, alternative remedy for the type of constitutional tort respondent has alleged, and, therefore, does not preclude her from seeking redress under *Bivens*. Pet. Br. at 34 n.12. *See Carlson*, 446 U.S. at 23 (holding that the "FTCA is not a sufficient protector of the

Nor do concerns about the federal fisc caution against recognizing a *Bivens* remedy in this case. *See* Pet. Br. at 37-38. This factor has been relied upon only once, in *FDIC v. Meyer*. In that case, the Court declined to imply a *Bivens* remedy in a suit against a federal agency based on the "potentially enormous financial burden" that might be imposed on the Government. 510 U.S. 471, 486 (1994). The claim here, however, is against petitioners in their individual capacities, not against a government agency. Any resulting liability would run only against the individuals named.[13]

Petitioners' suggestion that this case implicates national security does not alter the analysis. *See* Pet. Br. at 38-39. As discussed above, *see* pp.14-15, *supra*, the vast majority of access to courts cases do not touch on foreign affairs or national security. And, again, in the rare case in which national security is implicated, recognition of a *Bivens* remedy does not prohibit the proper invocation of the national security defense or the state secrets privilege. *Id.*

Finally, petitioners' reliance on *Malesko* is unavailing. In *Malesko*, the Court cautioned against applying *Bivens* remedies outside their original "context" – claims against individual federal officials. 122 S. Ct. at 521. The "new context" in *Malesko* was a claim against a private corporation operating under contract with a federal agency. *Id.* In declining to imply a *Bivens* remedy there, the Court relied on the concern that allowing suits against corporations would actually deter suits

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citizens' constitutional rights").

[13]Although the Government is permitted to indemnify petitioners in the event liability were established, it would not be obligated to do so. 28 C.F.R. § 50.15(a)(8)(iii).

against federal officials, because plaintiffs would be tempted to sue the entity most likely to satisfy a substantial judgment. *Id.* This, in turn, would frustrate a central objective of *Bivens* – deterring individual officials from engaging in unconstitutional conduct. *Id.*; *accord FDIC v. Meyer*, 510 U.S. at 486 (declining to extend *Bivens* to a claim against a federal agency). Here, the suit is against federal officials, and the concerns animating *Malesko* are not present.

III. PETITIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

The court below correctly concluded that petitioners are not entitled to qualified immunity. Petitioners acknowledge that courts of appeals should examine the opinions of other appellate courts to determine whether a "consensus of persuasive authority" existed during the relevant time period. Pet. Br. at 40. They nonetheless assert that the D.C. Circuit reached the wrong result in this case because it failed to recognize contrary decisions, and because it relied on decisions that postdated the events in question. Neither objection has merit.

At the time of the events alleged in the complaint, cases decided by three different courts of appeals had recognized that deliberate government interference designed to prevent a citizen from petitioning the courts violates the constitutional right of access to the courts. *See Barrett,* 798 F.2d at 575; *Bell,* 746 F.2d at 1261; *Ryland*, 708 F.2d at 973. No court of appeals had concluded otherwise. By the time the case was decided, two additional courts of appeals had reached the same conclusion. *See* Pet. App. 66a-67a (citing cases from the Second, Fifth,

Sixth, Seventh, and Ninth Circuits).[14] Although petitioners argue that these cases are distinguishable on their facts, Pet. Br. at 42-44, for a principle of law to be clearly established "the very action in question" need not have previously been held unlawful. *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987). Instead, the law need only allow officials to "reasonably anticipate when their conduct may give rise to liability for damages." *Id.* (internal quotation marks and citation omitted).

This rule strikes a balance between "avoiding excessive disruption of government" and protecting the "public interest in deterrence of unlawful conduct and in compensation of victims." *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). "'Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate.' This is as true in matters of national security as in other fields of government action." *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985) (*quoting Harlow,* 457 U.S. at 819); *see also Malley v. Briggs*, 475 U.S. 335, 343 (1986) ("[A]n officer who knows that objectively unreasonable decisions will be actionable may be motivated to reflect, . . . [b]ut such reflection is desirable.").

Because the relevant focus is whether, given existing case law, a reasonable official would have been aware that certain conduct was unlawful, the relevant inquiry in this case was not whether a case existed with this precise fact pattern, but "would

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[14] There is no disagreement that a court may not exclusively rely on cases post-dating the alleged misconduct in making a qualified immunity determination. Where a court justifies its decision on cases pre-dating the alleged conduct, however, a court cannot be faulted for taking note of more recent legal developments. *See, e.g., Wilson v. Layne*, 526 U.S. 603, 618 (1999).

an objectively reasonable official have thought it clearly unconstitutional to affirmatively mislead [a citizen] for the express purpose of preventing her from filing a lawsuit?" Pet. App. 27a. As did the *Bell*, *Barrett* and *Ryland* courts before it, the D.C. Circuit correctly answered that question in the affirmative. *Id.* at 28a.[15]

Petitioners' attempt to distinguish *Bell* and *Barrett* on the ground that the conduct alleged there was "nefarious," Pet. Br. at 43, is unavailing. Neither *Bell* nor *Barrett* depended on that characterization of the underlying conduct but, even if they had, the allegations here – lies told to conceal ongoing detention and torture – would easily meet such a test.[16] Petitioners' assertion that there were "weighty justifications" for the conduct alleged

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[15]In *Bell*, government officials with various degrees of culpability covered up a shooting by a police officer. The Seventh Circuit concluded that in doing so, the defendants violated the victim's family's constitutional right of redress. 746 F.2d at 1261-62. In *Barrett*, the court upheld an access to courts claim against four federal attorneys who conspired to conceal the Army's involvement in a case where an experimental drug supplied by the Army Chemical Corps accidentally killed a psychiatric patient. 798 F.2d at 569-70; 575. In doing so, the court noted that as early as 1953 courts "had clearly enunciated that the Constitution protects causes of action from arbitrary interference. . . ." *Id.* at 575 (citations omitted). And in *Ryland*, where a prosecutor and two district attorneys prevented an investigation into a murder by the prosecutor and falsified the victim's cause of death, the Court found that where the complaint "alleged that agents of the state intentionally engaged in conduct that interfered with their exercise of their constitutionally protected right to institute a wrongful death suit . . . [such a] theory of recovery [wa]s a valid one." 708 F.2d at 973.

[16]Nor is the fact that the cover-up involved other governmental actors relevant – as the D.C. Circuit noted, "access to court claims are not restricted to cases in which officials are alleged to have covered up their own illegal actions." Pet. App. 65a (citing *Bell*, 746 F.2d at 1256-58; *Ryland*, 708 F.2d at 969).

here also fails. Respondent has *pled* that the purpose for petitioners' deception was not weighty and legitimate, but was invalid. Even further afield is petitioners' argument that respondent has not alleged that she has been denied *all* access to the courts. That goes to the level of injury a respondent must demonstrate to state a claim, *see supra* at 12-19. It says nothing at all about whether the conduct in question is proscribed.

Petitioners' reliance on *Ryland* and *Crowder* is similarly misplaced. In *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989), the Fifth Circuit described *Ryland* as establishing that the right of access to courts is violated when "state officials wrongfully and intentionally conceal information crucial to a person's ability to obtain redress and that concealment and the delay engendered by it substantially reduce the likelihood of one's obtaining the relief to which one is otherwise entitled." *Id.* at 812. Although it failed to find a constitutional violation in that case, the court did so because the plaintiffs did *not* allege a "cover-up." *Id.* at 813. Five years later, the Fifth Circuit again recognized that the right of access to the courts is violated when a government official's deception delays or blocks altogether a plaintiff's ability to file suit. *Foster v. City of Lake Jackson*, 28 F.3d 425, 430 (5th Cir. 1994) (noting that the right was "clearly established in 1985-1988").[17]

Indeed, contrary to petitioners' assertions, developments in the law since 1994 actually bolster the decision below. Each of the courts of appeals to consider the issue since that time has added to the consensus of courts holding that a public official

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[17]The *Foster* court ultimately concluded that the plaintiffs in that case could not overcome qualified immunity because the claim was not that defendants impeded the plaintiffs' ability to file suit, but instead that defendants suppressed evidence after suit was filed, during the course of discovery. 28 F.3d at 427.

may not mislead citizens for the purpose of preventing a suit designed to test the legality of governmental conduct. *See, e.g., Vasquez*, 60 F.3d at 328-29; *Swekel*, 119 F.3d at 1262; *Delew v. Wagner*, 143 F.3d at 1222. Any perceived disagreement that has developed among the circuits with respect to "an exhaustion requirement" is irrelevant. Even if such disagreement exists, it goes only to the procedural steps a plaintiff must complete before bringing an access to courts claim, not to whether a government official is proscribed from engaging in certain conduct in the first instance.

Finally, the mere fact that this Court has granted certiorari to review this case does not provide a sufficient basis on which to ground a finding of qualified immunity. *See* Pet. Br. at 47-48. Certiorari may be granted for reasons that may or may not implicate the validity of the challenged conduct. Indeed, this Court has previously granted certiorari on a qualified immunity issue, then gone on to find that qualified immunity does not attach in that very case. *See, e.g., Malley*, 475 U.S. at 345-46.[18] Thus, the appropriate resolution of a qualified immunity defense is necessarily case-specific. Contrary to petitioners' assertions, the Court of Appeals properly resolved the issue here.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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[18]In *Malley*, even though the district and appellate courts disagreed, and even though this Court granted certiorari to review the question, it concluded that qualified immunity should not attach because the underlying law was sufficiently clear.

Respectfully submitted,

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Respondent.

On Writ Of Certiorari
To the United States Court Of Appeals
For The District of Columbia Circuit

BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AMICUS CURIAE IN SUPPORT OF RESPONDENT

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30 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF *AMICUS CURIAE*. 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT

I. THE RIGHT OF ACCESS TO THE COURTS TO SEEK LEGAL REMEDY IS AN IMPORTANT FUNDAMENTAL CONSTITUTIONAL RIGHT.. 3

A. The Right Of Access To The Courts To Seek Legal Remedy Is A Fundamental Right Secured By The Due Process Clause. 4

B. The Right to Access Was Intended to Include the Right to Pursue Legal Redress Against Government Officials For Constitutional Violations. 8

II. THE CONDUCT OF OFFICIALS ALLEGED IN THIS CASE VIOLATED WELL ESTABLISHED LAW. 11

A. It Is Well Established That Official Misrepresentations To Cover Up The Circumstances Of A Crime For The Purposes Of Avoiding Legal Action Violates Access To The Courts. 11

B. This Court Should Not Create A New Immunity For Disinformation In The Name Of National Security 17

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Agresta v. Sambor, 687 F. Supp 162 (E.D. Pa. 1988) 16

Barrett v. United States, 798 F.2d 565 (2d Cir. 1986)16, 21

Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984) 15

Boddie v. Connecticut, 401 U.S. 371 (1971).....3

Bounds v. Smith, 430 U.S. 817 (1977).....14

Boyd v. United States, 116 U.S. 616, 626-27 (1886)..10, 12

California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).....22

Chambers v. Baltimore & O. R.R., 207 U.S. 142 (1907) 9

Crowder v. Sinyard, 884 F.2d 804 (5th Cir. 1989), cert. denied, 496 U..S. 924 (1990) 19

Delew v. Wagner, 143 F.3d 1219 (9th Cir. 1998).....18

Doctor Bonham's Case, 8 Co. Rep. 107a, 77 Eng. Rep. 638 (C.P. 1610).....8

Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (1765).....12

Huckle v. Money, 2 Wils. 205, 95 Eng.Rep. 768 (C.P.1763) 11

Hurtado v. California, 110 U.S. 516 (1884).....5

Ingraham v. Wright, 430 U.S. 651 (1977) 5

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). 5

Meyer v. Nebraska, 262 U.S. 390 (1923). 5

Missouri Pacific Ry. Co. v. Humes, 115 U.S. 512 (1885). .5

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) ..7, 9

Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983).....14

Silver v. Cormier, 529 F.2d 161 (10th Cir. 1976) 13

Smothers v. Gresham Transfer, Inc., 23 P.3d 333 (Ore. 2001) 7

Swekel v. City of River Rouge, 119 F.3d 1259 (6th Cir.1997), cert. denied, 522 U.S. 1047 (1998).....17

Wilkes v. Halifax, 19 How. St. Tr. 1406 (C.P. 1769) 11

Wilkes v. Wood, Lofft 1, 98 Eng.Rep. 489 (C.P.1763)....11

Williams v. City of Boston, 784 F.2d 430 (1st Cir. 1986) 15

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).....13

STATUTES

42 U.S.C. § 1983 .....12, 13, 15

OTHER AUTHORITIES

Amar, Akhil Reed, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757 (1994). 11, 13

William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (1765).....7

Edward Coke, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *55 (London, E.&R. Brooke 1797). 7

James Dao, "Rumsfeld Says Pentagon Plan Won't Include Lies," *New York Times*, Feb. 20. 2002 23

Thomas Y. Davies, *Recovering The Original Fourth Amendment*, 98 Mich. L. Rev. 547 (1999) 12

A.E Dick Howard, THE ROAD FROM RUNNYMEDE (1968)7

William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section*

17 of the Tennessee Constitution, 27 U. Mem. L. Rev. 333 (1997) 8

Vernon Loeb and Dana Milbank, "New Defense Office Won't Mislead, Officials Say," *Washington Post*, Feb. 21, 2002 24

William Sharp McKechnie, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN (2d ed. rev. vol. 1914) 6

Ned Miltenberg *The Revolutionary 'Right To A Remedy,'* Trial, March, 1998 8

Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, and the Politics of Jury Power*, 91 Colum. L. Rev. 142 (1991) 12

David Schuman, *The Right to a Remedy*, 65 Temp. L. Rev., 1197 (1992) 9

Laurence H. Tribe, *Indiana's Medical Malpractice Reform*, 31 Ind. L. Rev. 1089 (1998) 8

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BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Trial Lawyers of America ("ATLA") respectfully submits this brief as amicus curiae in this case. Letters from Petitioner and Respondent granting consent to the filing of amicus curiae briefs have been filed with this Court. [1]

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation of submission of this brief.

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions.

ATLA's members are keenly aware of the importance of protecting and preserving the constitutional right of access to the courts for the redress of grievances. This right has served as a cornerstone of our system of justice and orderly government. ATLA's mission includes the defense of this right against those who would shut the doors of the courthouse for the sake of expediency.

SUMMARY OF THE ARGUMENT

1. The right of access to the courts to seek judicial remedy is a fundamental bedrock principle of the English common law, rooted in the Magna Carta. At the time the Due Process Clause was adopted, the right of access was established as fundamental principle of liberty, limiting the abuse of power by all parts of government. It is among the most important of the rights and liberties of the common law that Americans guaranteed for themselves in the Due Process Clause.

Nor did the drafters of the Bill of Rights view the right of access as narrowly applicable to barriers faced by prisoners and institutional barriers to litigants. Rather, the historical context in which the Due Process Clause was enacted indicates that they viewed the ability to sue government officials as an important safeguard of constitutional rights.

2. The decision below does not create a new or novel constitutional right, but reflects the application of well-established law. The right of access to the courts to seek legal remedy has been recognized thoughout our

history as a fundamental right. Moreover, a significant number of federal courts of appeals have applied that right in circumstances analogous to those presented in this case. Those courts have uniformly held that government officials who engage in a cover-up to conceal the circumstances surrounding a crime, for the purpose of preventing legal action by the victims or their families, may be liable for violation of the right of access to the courts.

This Court should reject the invitation by the United States to create a special immunity for government officials who issue false information in response to inquiries perceived to touch on national security. It is not the case that government official need to issue disinformation to do their jobs. Indeed, the Department of Defense has recently rejected such a policy. The principle that truthfulness on the part of government officials best serves the interests of the American people is, and ought to be, the law of the land.

ARGUMENT

I. THE RIGHT OF ACCESS TO THE COURTS TO SEEK LEGAL REMEDY IS AN IMPORTANT FUNDAMENTAL CONSTITUTIONAL RIGHT.

Petitioners' primary argument, supported by the Solicitor General, characterizes the right of access to the courts as confined to the state's obligations to prisoners and to narrow "institutional mechanisms," such as the fee requirement in *Boddie v. Connecticut*, 401 U.S. 371 (1971). Pet. Br. at 13. *See also* Brief of United States at 12 (the right of access extends no further "than protecting the ability of an inmate to prepare a petition or complaint"). Conflating plaintiff's constitutional right

and defendants' qualified immunity for its violation, they assert that the court below established a novel right of access that was not previously "well-established." Pet. Br. at 40-41; Brief of United States at 24.

ATLA respectfully submits that the right of access to the courts to seek judicial remedy is a fundamental bedrock principle of the English common law, rooted in the Magna Carta. It is among the most important of the rights and liberties of the common law that Americans guaranteed for themselves under the Due Process Clause as well as the First Amendment. The drafters of the Bill of Rights did not view the right of access as narrowly confined. Indeed, they viewed access to the courts to sue government officials as an important safeguard against abuses of power. Federal courts have recognized the broad scope of this right, permitting a cause of action by family members against government officials who intentionally deprived them of access to civil remedies by misrepresenting and covering up the circumstances of the deaths of their loved ones. The decision below does not stray from that long and familiar path.

A. The Right Of Access To The Courts To Seek Legal Remedy Is A Fundamental Right Secured By The Due Process Clause.

As Justice Powell observed;

> The Due Process Clause of the Fifth Amendment, later incorporated into the Fourteenth, was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown. The liberty preserved from deprivation without due process included the right 'generally to enjoy those privileges long recognized at common law as

> essential to the orderly pursuit of happiness by free men.'

Ingraham v. Wright, 430 U.S. 651, 673 (1977), quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). *See also Hurtado v. California*, 110 U.S. 516, 535 (1884) (due process consists of "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions").

Among those essential privileges is the right to obtain redress from the courts. Early in our nation's history, Chief Justice Marshall declared:

> [T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

This right of access to justice is so fundamental that this Court has held that the Fourteenth Amendment includes "the duty of every State to provide, in the administration of justice, for the redress of private wrongs." *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885).

The origins of that right, and its exercise free from improper interference by government officials, are firmly rooted in the Magna Carta of 1215. The barons at Runnymede, determined to end the king's manipulation of the courts for his own purposes, particularly through the sale of writs, compelled King John to vow in Chapter 40: "To no one will we sell, to

no one will we refuse or delay, right or justice."[2] The reissued Magna Carta in 1225 combined this provision with the seminal due process guarantee of Chapter 39,[3] into Chapter 29. In the words of Sir Edward Coke, Chapter 29 guaranteed that,

> every subject of this realme, for injury done to him...by any other subject... without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.

1 Edward Coke, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *55 (London, E.&R. Brooke 1797).

Nearly everything the drafters of the United States Constitution understood of this principle was learned from Coke. His explication of the Magna Carta, first published in 1642, (and in America in) was widely read by the Founding generation. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., concurring in judgment) ("The American colonists were intimately familiar with Coke"); A.E Dick Howard, THE ROAD FROM RUNNYMEDE 119-25 (1968). Moreover, Lord Coke's explication of Chapter 29 was restated with approval by William Blackstone, whose treatise was also widely studied by 18th Century Americans. 1

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2 See William Sharp McKechnie, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 22-122 (2d ed. rev. vol. 1914).

3 No freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.

Id.

William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *141 (1765).

Coke elevated the Maga Carta to its status as the source of all the fundamental principles of the common law, in which all the rules familiar to common law lawyers are grounded. *See* Justice Leeson's extensive and scholarly analysis in *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 339-50 (Ore. 2001). Coke vigorously asserted the primacy of these principles as a limitation on the power of all government.

He certainly viewed it as a limit on the authority of Parliament. As a judge, he upheld that limitation in *Doctor Bonham's Case*, 8 Co. Rep. 107a, 118a; 77 Eng. Rep. 638, 652 (C.P. 1610). The colonists frequently looked to Coke in their complaints that Parliament exceeded its authority in enacting the Stamp Acts and other hated statutes. Laurence H. Tribe, *Indiana's Medical Malpractice Reform*, 31 Ind. L. Rev. 1089, 1090-91 (1998); Ned Miltenberg *The Revolutionary 'Right To A Remedy,'* Trial, March, 1998, at 48-49.

Lord Coke was equally concerned with Chapter 29 as restriction on executive power. He asserted that the King could not consult with judges about pending cases and could not stop or delay proceedings in the common-law courts. King James eventually removed Lord Coke as chief justice of the King's Bench after Coke precipitated several crises to test this principle. *See* Judge William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. Mem. L. Rev. 333, 361 (1997).

From this perspective, the right to access and remedy is essential to judicial independence. *Id.* Courts have no roving commission to do justice. They must

wait for cases to come to court. Executive or legislative intervention to close the courthouse doors or prevent litigants from walking through them threatens the ability of the judicial branch to perform its constitutional function.

The degree to which this right is deemed fundamental to the American system of justice is reflected in the fact that 38 states have incorporated in their state constitutions provisions guaranteeing the right of access and remedy patterned after Coke's language. *See* David Schuman, *The Right to a Remedy*, 65 Temp. L. Rev., 1197, 1201 n. 25 (1992) (listing state constitutional provisions).

Although the U.S. Constitution does not contain a similar express guarantee, the adoption by the First Congress of the Fifth Amendment guarantee of due process was an "affirmation of Magna Charta according to Coke." Haslip at 29 (Scalia, J., concurring). This Court has left no doubt that access to the courts is a fundamental right. *Chambers v. Baltimore & O. R.R.*, 207 U.S. 142, 148 (1907) ("The Right to sue and defend in the courts is the alternative to force. In an organized society it is the Right conservative of all other rights and lies at the foundation of orderly government.")

B. The Right to Access Was Intended to Include the Right to Pursue Legal Redress Against Government Officials For Constitutional Violations.

Petitioner and the United States would confine the right of access to the barriers faced by prisoners and certain institutional barriers. The Solicitor General in particular argues that it is "unfathomable" that the Founders could have intended that false statements by

government officials give rise to suit for constitutional violations. Brief of United States at 23.

The Americans who drafted the Bill of Rights and guaranteed for themselves the common law rights developed under English law had their own views beyond those of Coke and Blackstone. As a historical matter, it is certain that they did not view the right of access to the courts as limited to prisoners or a narrow set of institutional restrictions.

This Court has observed that the cases involving John Wilkes were fresh in the minds of those who drafted the Bill of Rights. *Boyd v. United States*, 116 U.S. 616, 626-27 (1886). Indeed, Wilkes' successful lawsuit against England's under secretary of state, Robert Wood, "was probably the most famous case in late eighteenth century America." Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 772 (1994).

The Wilkes cases stemmed from an anonymous article in issue No. 45 of the *North Briton* which harshly criticized Prime Minister Grenville's address to Parliament, accusing Grenville of lying to the people of England with respect to the conduct of foreign affairs. Secretary of State Lord Halifax authorized an illegal general warrant for the arrest of those suspected of involvement. The King's messengers arrested 49 persons, including John Wilkes, a flamboyant opposition member of Parliament, who was the author. Many, including Wilkes, brought suit seeking damages for the deprivation of their rights.

The Wilkes affair generated a clutch of decisions establishing the illegality of general warrants and the authority of juries to award exemplary damages to punish and deter such oppression. *See Huckle v. Money*,

2 Wils. 205, 95 Eng.Rep. 768 (C.P.1763); and *Wilkes v. Wood*, Lofft 1, 98 Eng.Rep. 489 (C.P.1763) In *Wilkes v. Halifax*, 19 How. St. Tr. 1406 (C.P. 1769), Wilkes was awarded the substantial sum of 4,000 pounds against the Secretary of State himself. Accounts of the Wilkes cases appeared in newspapers and pamphlets throughout the colonies. Thomas Y. Davies, *Recovering The Original Fourth Amendment*, 98 Mich. L. Rev. 547, 564-65 & n.25 and 631 n.222 (1999). The broad power of the civil jury to award punitive damages, announced by Lord Camden in *Wilkes v. Wood*, was one of the rights of English subjects that Americans sought to preserve, giving impetus to the adoption of the Seventh Amendment, and to ratification of the constitution itself. *See*, Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 156-60 (1991).

A related case involved John Entick, a Wilkes associate and the author of the *Monitor*, to which Wilkes was a sometime contributor. He, too, was the victim of a general warrant and successfully sued the responsible officials. Lord Camden's opinion in *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (1765), was pronounced by this Court as a "landmark" of liberty and "monument" of English freedom with which "every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar." *Boyd*, at 626.

This history makes clear that those who drafted and adopted the Due Process guarantee did not view the right of access to the courts as a narrow, barely tolerated burden on government. Rather, they viewed the right to seek legal redress against government officials as an effective means of enforcing constitutional rights and preserving liberty from abuse

of power. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 786 (1994) ("In America, both before and after the Revolution, the civil trespass action tried to a jury flourished as the obvious remedy against haughty customs officers, tax collectors, constables, marshals, and the like.")

For Americans to turn to the courts for legal redress is not "cause for consternation." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 643 (1985) Rather,

> That our citizens have access to their civil courts...is an attribute of our system of justice in which we ought to take pride. The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights.

Id.

II. THE CONDUCT OF OFFICIALS ALLEGED IN THIS CASE VIOLATED WELL ESTABLISHED LAW.

A. It Is Well Established That Official Misrepresentations To Cover Up The Circumstances Of A Crime For The Purposes Of Avoiding Legal Action Violates Access To The Courts.

Petitioners, seeking qualified immunity for their concealment of the government's role in Bamaca's fate, deny that their conduct violated clearly established constitutional rights at the time of the events or that a reasonable official would have understood that such conduct would violate that right. Pet. Br. at 39 & 40.

In view of the historical developments described in Part I, *supra*, the right of access to the courts cannot be characterized as "a constitutional right that had not yet been declared" in 1993-94. *See* Pet. Br. at 41.

It is true that most of this Court's access-to-court decisions address the barriers faced by prisoners. *E.g., Bounds v. Smith*, 430 U.S. 817 (1977). However, the courts of appeals have applied the right of access in circumstances closely analogous to this case. Their decisions reflect a well-established consensus that officials who engage in a cover-up of circumstances surrounding a killing, including concealment of government involvement, may violate the rights of family members to seek legal remedy in court.

Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983), held that the parents of a woman murdered by a prosecutor could maintain an action under 42 U.S.C. § 1983 against a district attorney and other officials, based on allegations that defendants falsified a death certificate and took other actions to cover up the circumstances of the murder, thus interfering with plaintiffs' right to pursue a state wrongful death action. The Fifth Circuit noted that it is "well established today that [the right of access to the courts] is one of the fundamental rights protected by the Constitution," citing this Court's recognition that the right is protected under the Due Process Clause and the First Amendment right of petition. *Id.* at 972. The court found that defendants' cover-up deprived plaintiffs of access that is "adequate, effective, and meaningful." *Id.*, quoting *Bounds v. Smith*.

Similarly, the court in *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), upheld a jury verdict in favor of the family of a man fatally shot by a police

officer. Evidence showed that defendants, including the chief of police, conspired to conceal the facts relating to victim's death by falsifying police reports and planting a gun on victim, preventing plaintiffs from recovery in a wrongful death action. The court stated that "a conspiracy to cover up a killing, thereby obstructing legitimate efforts to vindicate the killing through judicial redress, interferes with the due process right of access to courts." *Id.* at 1261.

The court rejected a narrow interpretation of the right, similar to Petitioner's argument here:

> To deny such access defendants need not literally bar the courthouse door or attack plaintiffs' witnesses. This constitutional right is lost where, as here, police officials shield from the public and the victim's family key facts which would form the basis of the family's claims for redress.

Id.. *See also Williams v. City of Boston*, 784 F.2d 430, 435 (1st Cir. 1986) (Where parents of a high school student fatally shot at a football game asserted that officials concealed facts indicating negligence on the part of the city, the court citing *Bell*, stated that "official cover-up may violate section 1983 if it deprives the plaintiff of his right of access to the courts"; however, plaintiffs failed to raise this claim in the trial court); *Agresta v. Sambor*, 687 F. Supp 162, 167 (E.D. Pa. 1988) (parents whose adult son was fatally shot by Philadelphia police and who alleged that officials conspired to cover up the circumstances of their son's death, were entitled to maintain a civil rights action based on denial of their right of access to the courts).[4]

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[4] Misconduct that may violate the right of access is not limited to destruction or falsification of evidence. See Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976) (urban renewal official was liable for

In *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986), the estate of a patient who died in a state hospital filed a wrongful death action against the state. Many years later, the estate brought suit alleging that federal attorneys suborned perjury and impeded discovery in the state case. Their purpose was to conceal the fact that the patient's death was caused by injections supplied by the U.S. Army Chemical Corps in an experimental program testing chemical warfare agents and to prevent litigation against the federal government. Significantly, the court pointed out that the federal officials,

> were not under any duty to volunteer to the estate information that would alert it to the existence of a claim against the federal government and certain of its officials for Blauer's wrongful death. On the other hand, the government officials were not free to arbitrarily interfere with the estate's vindication of its claims. Unconstitutional deprivation of a cause of action occurs when government officials thwart vindication of a claim by violating basic principles that enable civil claimants to assert their rights effectively. Although in 1953-55 courts may not have explicitly stated this principle, they had clearly ennunciated that the Constitution protects causes of action from arbitrary interference.

Id. at 575.

The Sixth Circuit explicitly adopted the principle set forth in *Ryland* and *Bell* in *Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir.1997), cert. denied, 522 U.S. 1047 (1998). In that case, the survivor of a

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violating the right of access to the courts of a property owner where he threatened to withhold a relocation expense payment if the property owner filed a lawsuit to challenge the amount he received for the property).

pedistrian who was fatally injured while crossing an intersection alleged that defendant police officers covered up evidence that the son of a high ranking police officer was driving the vehicle and impeded plaintiff's own investigation into the accident until the statute of limitations for a wrongful death action had passed. The court noted that a plaintiff can establish violation of the right to access to the courts "by showing that the defendants' actions foreclosed her from filing suit in state court or rendered ineffective any state court remedy she previously may have had." *Id* at 1264. In the circumstances of this case, however, plaintiff failed to show that defendants' actions actually foreclosed her state remedies or rendered any resort to state court futile. *Id.*

In *Delew v. Wagner*, 143 F.3d 1219 (9th Cir. 1998), husband and parents of woman who was killed by an automobile driven by the wife of a state police officer stated a cause of action under 42 U.S.C. § 1983, based on allegations that defendant law enforcement officers covered up evidence that the driver was under the influence of alcohol, rendering ineffective plaintiffs' wrongful death claim. The court stated, "the Constitution guarantees plaintiffs the right of meaningful access to the courts, the denial of which is established where a party engages in pre-filing actions which effectively covers up evidence and actually renders any state court remedies ineffective." *Id.* at 1222.

Petitioners argue that these decisions reflect such "disagreement" among the courts and such a "nebulous" state of the law that they could not reasonably know that giving false or misleading information to Ms. Harbury might violate her rights. Pet. Br. at 41-42. In particular, Petitioners focus on the

more recent cases, *Swekel* and *Delew*, as reflecting "just the kind of discord among the lower courts that *compels* a finding of qualified immunity." Pet. Br. at 46.

ATLA submits that the decisions, both before and after 1993-94, are in unanimous agreement that

> [I]f state officials wrongfully and intentionally conceal information crucial to a person's ability to obtain redress through the courts, and do so for the purpose of frustrating that right, and that concealment and the delay engendered by it substantially reduce the likelihood of one's obtaining the relief to which one is otherwise entitled, they may have committed a constitutional violation.

Crowder v. Sinyard, 884 F.2d 804, 812 (5th Cir. 1989), cert. denied, 496 U..S. 924 (1990) (summarizing the holding of *Ryland*).

The discord perceived by Petitioners is merely the factual determination in each case as to whether the official misconduct substantially prejudiced plaintiff's ability to pursue the underlying claim so as to constitute a violation of meaningful access to the courts. For example, Petitioners mischaracterize the Ninth Circuit's disposition in *Delew* as a dismissal of plaintiffs' constitutional claim. Pet. Br. at 24 & 45. In fact, the court reversed the district court's dismissal, holding that plaintiffs had stated a claim for denial of access to the courts. 143 F.3d at 1222. Because plaintiffs' wrongful death action was still pending, the court remanded with instructions for the district court to dismiss the complaint without prejudice so as to allow plaintiffs to refile with allegations that defendants' cover up did in fact render that remedy ineffective. *Id.*

In *Swekel*, where defendants allegedly concealed the identity of the driver in a fatal accident, state law may have allowed plaintiff to proceed with her wrongful death action without that information. The court specifically condemned the alleged conduct as "reprehensible." 119 F.3d at 1264. However, she had not established that it had in fact foreclosed her ability to file suit.

Unlike the plaintiffs in the above-cited cases, Jennifer Harbury was not seeking money damages for past death or injury. The legal remedy she sought was information and injunctive relief that might have resulted in saving the life of her husband, a fact that Petitioners well knew. She may or may not have succeeded, just as the plaintiffs in *Bell*, *Ryland* and the other cited cases may or may not have prevailed in their wrongful death claims. Accepting Respondent's allegations as true, the officials in this case did not simply make it more difficult to obtain redress. By forestalling legal action by Harbury until after her husband was dead, they utterly destroyed any hope of obtaining the relief she sought.

None of the decisions described above would suggest to a reasonable official that covering up the circumstances surrounding Bamica's captivity and death was lawful or could not violate Ms. Harbury's right of access to the courts.

B. This Court Should Not Create A New Immunity For Disinformation In The Name Of National Security.

With all due respect, the brief of the Solicitor General is rendered less helpful by its strenuous insistence that the court below has imposed a new

affirmative duty on government officials to investigate and turn over its information to any inquiring citizen. *See* Brief of United States at 5, 8, 12 & 22.

ATLA submits that this is not a fair reading of the lower court's opinion and that much of the Solicitor General's effort strikes hard blows against an imagined foe. The court of appeals specifically stated that Ms. Harbury,

> never alleges that defendants breached a duty to disclose information to her. Rather, she alleges that they affirmatively deceived her into believing that they were actively seeking information about her husband. Instead of saying (as they could have) that they were unable to discuss Bamaca's situation, they sought to lull her into believing that they were working on her behalf.

Pet. App. 23a.

ATLA submits that the decision below falls within the principles that were well-established by other federal courts before 1993-94. *See, e.g., Barrett v. United States*, 798 F.2d 565, 575 (2d Cir. 1986), quoted above.

Instead, it is the Solicitor General who urges this Court to break new ground. He asks this Court to recognize, as an exception to the Due Process guarantee, that government officials must sometimes lie to the American people in order to serve the American people. "[T]he perhaps unfortunate reality," he states, "is that the issuance of incomplete information and even misinformation by government may sometimes be perceived as necessary to protect vital interests." Brief of United States at 23. This includes situations where "the government official may actually 'intend' to forestall litigation." *Id.*

From this novel perspective, the Solicitor General suggests that Ms. Harbury had a duty to assume that Respondents were being untruthful with her. She should have aggressively pursued all available legal means to compel government officials to do what they had assured her was already being done. *Id.* at 18. Because she relied on Respondents' false assurances, it is argued, failure to save her husband's life "resulted from her voluntary choice." *Id.*

Indeed, the Solicitor General argues that the American people are better served by officials who give false information regarding sensitive subjects rather than issue a "no comment." *Id.* at 23-24.

The sole authority that this cynical view is or ought to be enshrined in law is a phrase taken from *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) that "misrepresentations" may be "condoned in the political arena." Brief of United States at 23.

The Court there was not addressing the actions of public officials, but of private citizens who filed baseless lawsuits as part of a lobbying effort. More importantly, the passage cited offers no support for the Solicitor General's proposition:

> There are many other forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations. Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process. . . . [It may be] established that abuse of those processes produced an illegal result, viz., effectively barring respondents from access to the agencies and courts. Insofar as the administrative or judicial processes are involved, actions of that kind cannot acquire

> immunity by seeking refuge under the umbrella of 'political expression.'

Id.

The fact is that issuing false information, even as to matters touching upon national security, is not the policy of the United States. Such a policy might be expected to apply most directly to the Department of Defense, currently fighting America's war on terrorism. However, the Defense Department recently made clear that such a policy does not exist and would not serve America's interests.

Commenting on the Department's new Office of Strategic Influence, created after the Sept. 11 attacks, Secretary of Defense Donald H. Rumsfeld emphasized:

> What people have to understand about this is very clear: number one, government officials, the Department of Defense, this secretary and the people that work with me tell the American people and the people of the world the truth."

James Dao, "Rumsfeld Says Pentagon Plan Won't Include Lies," *New York Times*, Feb. 20. 2002

Douglas Feith, undersecretary of defense for policy and the official responsible for overseeing the new office explained its policy:

> Defense Department officials don't lie to the public. We are confident that the truth serves our interests in the broadest sense of our national security and specifically in this war.

Vernon Loeb and Dana Milbank, "New Defense Office Won't Mislead, Officials Say," *Washington Post*, Feb. 21, 2002, at A15.

ATLA submits that the principle reflected in this statement of government policy, not the cynical view

expressed by the Solicitor General, has been, is, and ought to be the law of the land.

CONCLUSION

For the above reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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